No. 82-1771

IN THE

Supreme Court of the United States

October Term 1983

UNITED STATES OF AMERICA,

Petitioner,

v.

ALBERTO ANTONIO LEON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENT, ALBERTO ANTONIO LEON.

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Question Presented.

Where police seize evidence pursuant to a warrant issued without probable cause, should this Court refuse to apply the exclusionary rule when that evidence is offered in the government's case-in-chief, on the rationale that the Court should ignore the admitted Fourth Amendment violation and look only at the subjective and objective good faith of the searching officer, despite the exclusionary rule's function as the only meaningful systemic disincentive to such constitutional violations?

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Statement of Facts.

This case involves a single warrant authorizing the search of three houses and four automobiles. [J.A. 34-35] One of the houses is located on South Sunset Canyon in Burbank, California, and owned by Respondent Alberto Leon. Respondent Leon adopts the facts as stated by Petitioner, with the addition of the following information from the affidavit in support of the search warrant, relative to purported cause to search the house on South Sunset Canyon.

On August 18, 1981, the affiant, a Burbank California policeman, received a tip from an unproven confidential informant that the occupants of 620 Price Drive, later identified as Respondents Stewart and Sanchez, were dealing in drugs. [J.A. 37] The informant claimed to have seen a drug transaction and a large amount of cash at the Price Drive house five months earlier. [*Id.*] This informant made no mention of Alberto Leon. [*Id.*]

Officers conducted periodic surveillance of the Price Drive house beginning on August 19. [J.A. 38] On August 24, they saw someone arrive and leave in a car registered to Respondent Del Castillo. [*Id.*] They learned from police records that while Del Castillo was on probation, at an undisclosed time between January, 1979, and March, 1981, he listed an

address and phone number for his employer, which was found to be listed to "Albert" Leon. The address was 320 Stocker, in Glendale, California. [J.A. 39]

Nine days later, on August 28, surveillance officers saw Respondent Sanchez leave the Price Drive residence and drive to a house at 715 S. Sunset Canyon in Burbank. [J.A. 42] Utilities and the telephone at this house were listed to "Albert" Leon. [J.A. 40] Sanchez stayed in the house for twenty minutes, and left with what is described as a small package. [J.A. 42] Mr. Leon was not seen at this or any other time throughout the investigation, though a car registered to Leon was parked on the street in front of the house at the time of Sanchez's visit. [*Id.*]

Three weeks after that, on September 19, an unidentified male drove from the Price Drive residence to the house on Sunset Canyon at some time after 10:00 p.m. in a car registered to Armando Sanchez. [J.A. 48-49] The visitor left Sunset Canyon shortly after midnight, and drove back to Price Drive. [J.A. 49] During his visit, a car registered to Albert A. Leon and Denorah Jimenez was parked in the driveway of the Sunset Canyon house. [*Id.*] No further activity regarding Sunset Canyon or Alberto Leon was observed by the officers.

In addition to the above facts, the affidavit referred to Respondent Leon's arrest record and statements from two unproven informants.

In July of 1981, the affiant learned from the Glendale, California police that an unnamed informant had said, on an undisclosed date, that Albert Leon had a quantity of quaalude tablets in his residence on Stocker in Glendale. [J.A. 40] The affidavit includes no facts about the informant's identity or credibility. During the last week of August, the affiant was told that the informant had been unwilling to attempt to purchase drugs from Leon. [*Id.*]

In April of 1980, Leon and three others had been arrested by the Burbank police and charged with possession of drugs. [J.A. 39] The affiant was apparently somehow involved in this arrest. [*Id.*] The District Attorney declined prosecution of Leon, and one of the other arrestees was ultimately convicted of possession of the drugs found at the time of the arrest. [*Id.*] One of the arrestees, Kathleen Wolsic, was questioned while in jail. [J.A. 39-40] She said she could not give any information about Leon, because he was involved with the "Cuban Mafia" and drug importation. [J.A. 40] The affidavit lists no details about Kathleen Wolsic's background, nor any asserted basis for her statements about Leon.

The only other information relating to Respondent Leon in the affidavit is that he was arrested in Laguna Beach, California, in 1979 for possession

of a "small quantity" of drugs; the affiant found no record that he was convicted in that incident. [J.A. 40]

In ruling on the motion to suppress, the district court found:

> "There is no question of the reliability and credibility of the informant as not being established. . . . The material referring to the other information [sic] with respect to the defendant Leon, I think is in about the same category. If he was the one the information came from, the police department—but again, that is information from some informant about which we know nothing." [J.A. 127]

The district court ruled that only Respondent Leon had standing to suppress items seized from the Sunset Canyon house [J.A. 128], and that Leon had no standing to suppress items seized from any of the other houses and automobiles searched in this case. [J.A. 127-130]

After ruling on the suppression motions, the case was continued to the next day so that the Assistant U.S. Attorney could determine whether the government desired to appeal the rulings before proceeding to trial. [J.A. 130-131] On the following day, the Assistant requested the court to make a finding "that the officers acted in good faith." [J.A. 139] This was the first and only occasion on which reference was made to the issue of good faith during the suppression motion hearing; there was no argument or additional testimony presented on this issue.

Summary of Argument.

In this case, evidence was seized by state officers under a search warrant which was not supported by probable cause. Petitioner proposes that this evidence obtained in violation of the Fourth Amendment should be admissible in federal court as part of the government's case in chief. The essence of Petitioner's argument is that because: (1) the principal rationale for the exclusionary rule in any context is merely deterrence of the searching officer and (2) an officer who "reasonably" relies on a warrant cannot be deterred; the rule should not apply to searches conducted under a warrant unsupported by probable cause, in light of the overwhelming value of the seized evidence in the search for truth and the conviction of suspected criminals. Creating this unprecedented exception would inevitably be translated to the "reasonable, well trained" police officer as a new rule: by simply getting a magistrate's signature on a warrant, the search almost always will be "legal," and whatever evidence is discovered will be admissible. While this may increase incentives to utilize warrants, it will also eliminate any incentive to comply with the probable cause requirement.

The Court should not condone such violations of the Fourth Amendment. This exception would rest on an empty and unprecedented distinc-

tion between police conduct and constitutional violations by magistrates. In practice, it would nullify the purpose of the Warrant Clause, substantively denigrate the probable cause standard, cause increasingly complex and burdensome litigation, undermine the systemic deterrence function of the exclusionary rule and encourage unconstitutional searches.

The proposal would inappropriately focus the Court's attention on the conduct of the police officer in obtaining and executing a warrant and allow the use of warrants unsupported by probable cause as if they were authorized by the Constitution. Yet any otherwise suppressed evidence "saved" by the proposed exception would be evidence which the framers of the Warrant Clause determined should not have been seized. In effect, Petitioner seeks to rewrite the Fourth Amendment to read: "No Warrants shall issue, but upon an undefined showing of something a police officer perceives as close to a substantial basis for probable cause, as irrefutably determined, reasonably and unreasonably, by a magistrate."

For practical purposes, the good faith exception rationale takes the unprecedented step of eliminating any judicial review of a magistrate's finding of probable cause. Magistrates authorize the invasion of homes in hurried, *ex parte* proceedings. The *ex parte* nature of these proceedings is justified by the assumption that the victim of the search will have an opportunity for later judicial review of the probable cause finding in an adversary context. Across the country, over 10,000 magistrates in 59 court systems in 39 states are non-attorneys with authority to issue search warrants. Many are not required to have any legal training or even a high school diploma. These people have license to authorize the invasion of homes by police to ferret out evidence of suspected wrongdoing. Much of this evidence would be admissible in federal court. Petitioner proposes to allow these magistrates to authorize such invasions without any meaningful judicial review of their decisions, despite the fact that often, as in this case, the searches will be prohibited by the Fourth Amendment.

Magistrates must rely on judicial review to provide guidelines for their determinations, particularly under the fluid standards of *Illinois v. Gates*, ___ U.S. ___, 103 S. Ct. 2317 (1983). Absent judicial review under the proposed exception, reviewing courts will lose control over the decreasing probable cause standard applied by magistrates, who will come to rely on the "substantial basis" standard of review as the standard to be applied in initial probable cause determinations. As a result, many magistrates will increasingly become mere rubber stamps, and there will be no alternative available to ensure that magistrates apply the proper standards of the Warrant Clause. In *Gates* the Court recognized this

problem by emphasizing the necessity of continued judicial scrutiny of magistrates' decisions. Petitioner's proposal would do away with this safeguard, effectively overruling *Gates*.

The proposed exception would also remove police incentives to comply with the probable cause standard and would encourage violations of the substantive requirements of the Warrant Clause, by encouraging magistrate shopping and discouraging internal review of warrant applications and thorough pre-warrant investigations to confirm probable cause. Police will be encouraged to maintain the knowledge attributable to the "reasonable" officer at a minimum level of constitutional sensitivity. The practical elimination of search and seizure litigation in good faith cases would effectively freeze the development of Fourth Amendment law at a time when significant questions of the constitutional protection of privacy against governmental intrusion remain to be answered. Moreover, the proposed good faith exception would wreak havoc with settled precedent in many areas of the law. In addition, other warrant clause violations, such as the lack of particularity or a neutral and detached magistrate, would go unchecked under the good faith rationale, despite the clear mandate of the Fourth Amendment.

The exception involves unworkable standards to determine what is "reasonable," what is a "well-trained" officer, and a host of other issues. Its application requires unavoidable subjective inquiries, fraught with the potential for police perjury. These issues will necessitate complex, multi-layered and overly burdensome judicial hearings.

The application of the exclusionary rule and its concomitant "cost" has been severely limited in recent years. This is exemplified by the application of standing requirements in this case. Despite the lack of probable cause for any of the five searches involved in this case, little evidence was suppressed as to any defendant. The bulk of the illegally seized contraband was not suppressed because no defendant had a reasonable expectation of privacy in the alleged "stash pad" where it was found.

Statistical studies establish that overall, relatively little evidence is excluded under the rule. Moreover, the amount of evidence seized under warrants and ultimately suppressed is not substantial. The proposed exception would not even "save" all of that evidence, unless it would include evidence seized in reliance on a wholly conclusory warrant application.

The exception would also significantly dilute the probable cause standard. Reviewing courts will focus only upon the reasonableness of an officer's reliance on the warrant, without defining the actual boundaries

of probable cause. As a result, that standard will degenerate to something only "reasonably" close to probable cause as viewed through the eyes of a police officer, in derogation of the required independent assessment by a detached magistrate mandated by the Warrant Clause.

In this case the exclusionary rule is constitutionally mandated. The Fourth Amendment presumes its enforcement. Cases limiting peripheral applications of the exclusionary rule, based on a cost-benefit analysis of its deterrent function, presume that the rule will be applied in federal court to the use of evidence in the government's case-in-chief. Application of a cost-benefit analysis to this central application of the rule is inappropriate. The balancing of costs and benefits in this situation is inconsistent with this Court's approach to analogous violations of the Fifth and Sixth Amendments.

A practical exception to the requirements of the Warrant Clause will affirmatively encourage violations of the Fourth Amendment's probable cause standard. The Constitution is blind to public sentiment and compels the Court not to waiver from the conclusion, consistently affirmed and reinforced by 70 years' experience, that the core application of the exclusionary rule is the only meaningful judicial inducement for compliance with the Warrant Clause, the heart of the Fourth Amendment.

The rule's core value as a systemic disincentive against Fourth Amendment violations has been consistently upheld by the Court and its application in this context is a constitutionally compelled remedy. The rule has been proven to be a significant systemic deterrent. As applied to a search warrant issued without probable cause, it encourages compliance with that standard by magistrates and by the police, promotes thorough investigation and internal review of warrant applications, and discourages magistrate shopping and reliance on unreasonable warrants.

No alternative is available to remedy the acknowledged Fourth Amendment violations to which the proposed exception would apply. Even if civil remedies were available, they would be precluded by the same "good faith" defense which is the basis for the exception.

Even if the Court chooses to abandon meaningful enforcement of the probable cause standard for certain "reasonably unreasonable" warrants, the facts underlying the search of Respondent Leon's house on Sunset Canyon fall so far short of probable cause to believe contraband would be found there that any good faith exception to the Warrant Clause cannot apply to that search.

The tips regarding Leon, as set out in the warrant application are stale and include no corroboration or facts regarding the informants' credibility,

reliability, or basis of knowledge. Moreover, the warrant application does not provide any facts indicating that contraband would be found in Mr. Leon's house in Burbank. The warrant did not meet the substantial basis test reiterated in *Gates*. Although the good faith issue was not litigated in the trial court, the warrant to search the Sunset Canyon house could not have been reasonably relied upon in good faith by a well-trained officer.

ARGUMENT.

I.

IN PRACTICE, AN EXCEPTION TO THE EXCLUSIONARY RULE FOR "REASONABLE, GOOD FAITH" RELIANCE ON AN ILLEGAL SEARCH WARRANT WOULD INFLICT ENORMOUS DAMAGE TO FOURTH AMENDMENT INTERESTS.

A. A "Reasonable Good Faith Reliance" Exception as Applied to Search Warrants Would Bar Any Meaningful Review of a Magistrate's Decision.

While going to great pains to justify a dramatic modification of the exclusionary rule's scope, Petitioner has not defined the precise terms of the proposed "reasonable mistake" or "reasonable good faith reliance"[1] exception. Indeed, Petitioner admits that application of the proposed modification cannot be "precisely mapped out" [P. Br. at 48], and asserts that "many of the practical details concerning the application of such an exception are best left to future cases and initial resolution by lower courts. . . ." [P. Br. at 77] Yet assuming that the economic cost-benefit analysis espoused by Petitioner is appropriate in examining the proper scope of the exclusionary rule,[2] it is essential to define the scope of the proposed exception. It then becomes clear that in theory a "reasonable, good faith" exception does not accomplish a great deal, while in practice it imposes enormous damage to Fourth Amendment interests.

The proposed exception would presumably make available certain evidence which is currently excluded from use in the government's case-in-chief because it was seized pursuant to a warrant which was not supported by probable cause. If the reasonable good faith test applies to the

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[1]In framing the question presented in the Petition for Certiorari, Petitioner referred to "reasonable good faith reliance on a search warrant" [Petition for Writ of Certiorari, hereinafter cited as Pet., at i]. In its brief of the merits, Petitioner refers to a proposed "reasonable mistake exception" [*see, e.g.*, Petitioner's brief, hereinafter cited as P. Br., at 77]. As explained *infra*, pp. 30-37, this variance in terms belies the conceptual vagaries and contradictions in the proposed modification.

[2]Respondent Leon submits that this analysis is not appropriate to judicial enforcement of the protections guaranteed by the Fourth Amendment, in the context of evidence presented by the government in federal courts as part of its case-in-chief against the victim of a governmental violation of the Fourth Amendment. *See infra* pp. 58-60.

magistrate who issued the warrant, in theory few warrants would fall within the exception.

Last term, the Court held that a magistrate's finding of probable cause will not be disturbed if the magistrate had a "substantial basis," under the "totality of the circumstances" for finding a "fair probability" that the sought items will be found in the place to be searched. *Illinois v. Gates*, ___ U.S. ___, 103 S. Ct. 2317, 2331-32 (1983). The Court reiterated its policy of "great deference" to a magistrate's finding of probable cause, and its aversion to a grudging or negative attitude by reviewing courts toward warrants. *Id.* at 2331. Given the strong policy of deference to the magistrate's finding, it is unlikely that a finding of probable cause which was not supported by any substantial commonsense basis for finding a fair probability would be determined to be a "reasonable, good faith mistake."[3]

Therefore, the exception proposed by Petitioner, if it were to apply to the issuing magistrate, is to some extent the equivalent of the law articulated in *Gates*.[4] To the extent the magistrate had an objectively reasonable belief in probable cause, the warrant is within the proper scope of the Fourth Amendment. If framed as a matter of the magistrate's subjective good faith, the proposed exception would merely restate the constitutional requirement that the magistrate be "neutral and detached."

It follows that the proposed exception to the exclusionary rule is actually an exception to the Warrant Clause, which would focus only upon the conduct or state of mind of the officer who executes the warrant.[5] As a result, the broad discretion exercised by the magistrate who issues a search warrant would be virtually immune from judicial review.

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[3]The probable cause standard takes into account objectively reasonable mistakes of fact. *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979); *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *Henry v. United States*, 361 U.S. 98, 102 (1959). The standard already affords precisely the scope for reasonable factual errors which would be accomplished by a reasonable good faith exception.

[4]This point was recognized by Justice White in his concurring opinion: "The Court's own holding that the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis' for concluding that probable cause existed . . . is itself but a variation on the good-faith theme." *Illinois v. Gates*, 103 S. Ct. at 2338 (White, J., concurring).

[5]This is necessarily conceded by Petitioner as a result of the contention that the exclusionary rule deters only police and not judicial misconduct. In wrestling with the problem of avoiding warrants devoid of non-conclusory facts to support probable cause, as in *Nathanson v. United States*, 290 U.S. 41, 46 (1933) and *Aguilar v. Texas*, 378 U.S. 108, 113-14 (1964), Petitioner attempts to focus on the officer's conduct by asserting that no well-trained officer would reasonably believe that such a warrant should issue. P. Br. at 66 n.28.

1. Abdication of Judicial Control Over Magistrates Is Precluded by *Stare Decisis*.

This Court has consistently required and relied upon judicial scrutiny of magistrate determinations of probable cause.[6] In *Illinois v. Gates*, 103 S. Ct. at 2332, the Court emphasized that there are clearly "limits beyond which a magistrate may not venture in issuing a warrant," citing conclusory affidavits of *Nathanson* and *Aguilar* as examples. The Court concluded that "[i]n order to ensure that such an abdication of the magistrate's duty does not occur, courts *must continue to conscientiously review* the sufficiency of affidavits on which warrants are issued." *Id.* (emphasis added).

The provision of an opportunity to review the issuance of a warrant is considered a major function served by the Warrant Clause. *See United States v. Christine*, 687 F.2d 749, 756-57 (3d Cir. 1982). Application of a simplistic test which stops with an officer's reasonable reliance on a signed warrant would require the courts to abdicate essential control over the magistrate's exercise of discretion.

2. Judicial Review Is Essential Because Non-Attorney Magistrates Make Important *Ex Parte* Factual Determinations.

Search warrant applications necessarily involve an *ex parte* proceeding without the benefit of adversary representation of Fourth Amendment interests. This process is generally marked with urgency and a heavy reliance upon untestable hearsay.[7] In this context, the magistrate will tend to rely upon the initiative of the party presenting the application.[8] As

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[6]In a long line of cases, the Court has consistently upheld the necessity of review of the warrant process to ensure the propriety of underlying probable cause decisions. *See, e.g., Franks v. Delaware*, 438 U.S. 154, 184-85 (1978) (Rehnquist, J., dissenting); *Spinelli v. United States*, 393 U.S. 410, 419 (1969); *Aguilar v. Texas*, 378 U.S. 108, 111 (1964); *Giordenello v. United States*, 357 U.S. 480, 483 (1958);.

[7]In many jurisdictions, magistrates may issue warrants by telephone. *See, e.g.*, FED. R. CRIM. P. 41(c)(2) (Supp. 1983); ARIZ. REV. STAT. ANN. § 13-3914 (C) (1978); CAL. PENAL CODE §§ 1526(b), 1528(b) (1982).

[8]*See* Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1024 (1974); Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 571 (1983) [hereinafter cited as Kamisar, *The Exclusionary Rule*].

observed by the *Franks* Court, "[i]t is the *ex parte* nature of the initial hearing . . . that is the reason for the review." *Franks*, 438 U.S. at 169. Despite the deference accorded to the magistrate's fact determination, and occasional disagreement regarding particular findings of probable cause, it appears that not a single Justice of this Court since *Weeks* has ever voted to decide a case on the ground that the magistrate's decision is immune from judicial review. The *ex parte* nature of warrant application proceedings can only be justified by the assurance of an opportunity for later judicial scrutiny in an adversary context.[9]

The danger of an abuse of discretion in the context of the *ex parte* issuance of search warrants is incalculably increased by the minimal qualifications required to act as a magistrate with full authority to issue search and arrest warrants. "[I]t has never been held that only a lawyer or judge could grant a warrant, regardless of the court system or type of warrant involved." *Shadwick v. City of Tampa*, 407 U.S. 345, 348 (1972). *Shadwick* approved issuance of an arrest warrant for violation of a city ordinance by a muncipal court clerk whose job qualifications required no law degree or legal training. *Id.* at 347. The Court limited its holding to the warrant in question, noting that the clerk was not authorized to issue search warrants or even a misdemeanor arrest warrant. *Id.* In practice, judicial systems have granted authority far beyond that in *Shadwick*. For example, in *State v. Upchurch*, 267 N.C. 417, 148 S.E.2d 259 (1966), a search warrant was issued by an assistant clerk of the recorder's court of Durham County, North Carolina. The state supreme court found the clerk did not have "the slightest comprehension as to what her legal duties and responsibilities are in connection with the issuance of a search warrant." *Id.*, 148 S.E.2d at 261.[10]

The specter of a warrant issued by a person with no meaningful legal training is a very real problem in the American judicial system. A recent study found approximately 14,000 non-attorneys acting as judges in the

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[9]Certainly the warrant to search Respondent Leon's house on Sunset Canyon would never have been issued if his interests had been represented when the magistrate considered the warrant application. That warrant illustrates how the absence of cause to search a given place is easily overlooked in an *ex parte* consideration of a warrant application which lists a number of locations to be searched.

[10]The assistant clerk had testified regarding her practice when officers requested a warrant that "all I can say is they come in and ask if I will witness their signature, and I witness it." *Id.*, 148 S.E.2d at 260.

United States. L. SILBERMAN, NON-ATTORNEY JUSTICE IN THE UNITED STATES: AN EMPIRICAL STUDY 25 (1979) [hereinafter cited as NON-ATTORNEY JUSTICE]. The study found that most lay judges are elected [*id.* at 25], most are authorized to issue arrest and search warrants [*id.* at 29], and many had no formal training even after assuming the bench.[11] Of the 44 states with non-attorney judges, 19 do not require any type of training program [*id.* at 236]; a few merely require the judge to be a high school graduate, while others require that a judge be "literate." [*Id.* at 25.]

The study specified 56 court systems in 36 states where non-attorney magistrates are authorized to issue search warrants. Of these 56 court systems, 26 have absolutely no training requirement, 50 have no minimum age for magistrates, and 48 do not even require a high school diploma.[12] Approximately 10,580 non-attorney magistrates sit in the 56 state court systems which authorize lay magistrates to issue search warrants.[13] An independent survey and analysis of current state court systems by counsel for Respondent has verified that non-attorney magistrates are authorized by statute to issue search warrants in various court systems in at least 39 states as of this year.[14] Moreover, in a number of states a search warrant may be issued by a non-attorney clerk.[15]

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[11]NON-ATTORNEY JUSTICE, *supra*, at 74. The study noted that prior occupations of lay judges included auto dealer, land developer, farmer, bus driver, mail carrier, policeman, state trooper and copy editor. *Id.* at 75.

[12]These figures are compiled from the "Tabulated Summaries of Lay Judge Statutes," *id.* at 261 app. B. In 39 of the court systems where lay magistrates are authorized to issue search warrants, the magistrates are elected to office. *Id.*

[13]This figure was compiled from the "Lay Judge Census," *id.* at 253 app. A.

[14]See Appendix, listing states which statutorily authorize issuance of search warrants by non-attorneys.

[15]For example, in Kentucky a clerk of the circuit court may issue search or arrest warrants if there is no judge or trial commissioner in the county when the warrant is sought. KY. REV. STAT. § 15.725 (4) (Supp. 1982). In Massachusetts a search warrant may be issued by a court clerk, assistant clerk, temporary clerk or assistant temporary clerk. MASS. ANN. LAWS ch. 218, § 33 (Michie/Law. Co-op. Supp. 1983). Similarly, in North Carolina warrants can be issued by clerks of court and assistant and deputy clerks of court who have no minimum educational requirements. N.C. GEN. STAT. § 7A-180(5) (1981).

Thousands of non-attorney state magistrates are also authorized to issue search warrants for use in federal court. Fed. R. Crim. P. Rule 41(a) authorizes issuance of search warrants by "a judge of a state court of record within the district wherein the property is located. . . ." Whether a given state court is a "court of record" is determined by state law. *See, e.g., United States v. Walker*, 469 F.2d 1375, 1377 (5th Cir. 1972). Most of the state courts which authorize non-attorney magistrates to issue search warrants fall in this category; as a result thousands of non-attorneys can issue warrants at the behest of federal law enforcement officers or attorneys for use in federal cases. Well over 1,600 of these lay magistrates are not required to have any type of training. Moreover, the fruits of any warrant issued by the 10,580 non-attorney magistrates authorized to do so could be used in a federal criminal case if the officers who obtained the warrant acted independently from federal agents, and the state warrant was not utilized in intentional or deliberate disregard of Rule 41. *United States v. Radlick*, 581 F.2d 225, 228-29 (9th Cir. 1978).

3. The Current Flexible Standard of "Reasonableness" for Finding Probable Cause Provides Little Guidance for Magistrates, and Its Application Requires Judicial Scrutiny.

In *Illinois v. Gates*, 103 S. Ct. 2317, 2328 (1983), the Court acknowledged that "probable cause is a fluid concept — turning on the assessment of probabilities in particular factual contexts — not readily, nor even usefully, reduced to a neat set of legal rules." Professor Kamisar has likened this "flexible," "totality of the circumstances" approach to probable cause to the "largely unmanageable and unreviewable totality of the circumstances test" utilized in determining the voluntariness of statements prior to *Escobedo v. Illinois*, 378 U.S. 478 (1964) and *Miranda v. Arizona*, 384 U.S. 436 (1966). He notes that while in theory courts were supposed to take into account various factors such as whether the defendant was advised of his right to counsel, asked to see a lawyer, or was allowed to seek advice, in practice few courts actually did take these factors into account. This ultimately compelled the rules set out in *Escobedo* and *Miranda*.[16]

A number of commentators have expressed well-founded concern that this flexible approach to the issuance of search warrants will deprive

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[16]Comments of Yale Kamisar, Supreme Court Review and Constitutional Law Symposium, 52 U.S.L.W. 2228, 2230 (October 25, 1983).

magistrates of meaningful guidance.[17] The Court shared this concern in *Gates*, observing that search warrants "long have been issued by persons who are neither lawyers nor judges, and who certainly do not remain abreast of each judicial refinement of the nature of 'probable cause'," *Gates*, 103 S. Ct. at 2330 (citation omitted), and concluding that "courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued" in order to ensure that an abdication of the magistrate's duty does not occur, *id.* at 2332.[18]

In light of the unguided flexibility afforded magistrates of dubious qualifications,[19] continued judicial review is now of paramount importance. Adoption of the proposed exception to the exclusionary rule, which would focus merely upon the police officer's reliance upon a warrant, would render this judicial review virtually impossible and meaningless at best.

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[17]*E.g.*, *id.* at 2230; Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 456 (1981) (hereinafter Mertens & Wasserstrom) (the magistrate "has standards to consult only because the appellate courts have decided enough cases, including some important ones involving review of affidavits in support of warrant applications, to provide guidance").

[18]Justice Rehnquist, with the Chief Justice, echoed this reasoning in *Franks v. Delaware*, 438 U.S. 154 (1978):

> The Court has thus for more than a decade rejected the first possible stopping place in judicial re-examination of affidavits in support of warrants, and held that the legal determination as to probable cause was subject to collateral attack. While this conclusion does not seem to me to flow inexorably from the Fourth Amendment, I think that it makes a good deal of sense in light of the fact that a magistrate need not be a trained lawyer, see *Shadwick*, *supra*, and therefore may not be versed in the latest nuances of what is or what is not "probable cause" for purposes of the Fourth Amendment.

Id. at 184-85 (Rehnquist, J., dissenting).

[19]In her study of lay magistrates Professor Silberman found a major criticism to be their lack of awareness of many legal issues and their inability to analyze legal issues adequately. NON-ATTORNEY JUSTICE, *supra*, at 11. Judges cited requests for search warrants as a particularly problematic area, *id.* at 81, and lawyers criticized lay magistrates' misapplication of probable cause standards, *id.* at 84. The author concluded that search warrant applications should be handled by attorney judges whenever possible. *Id.* at 110. Unfortunately, there is no reason to believe this recommendation is carried out in practice.

4. Under the Proposed Exception, Magistrates Will Inevitably Apply a Diluted Standard for Determining Probable Cause.

Judicial review of magistrate determinations is also necessary to avoid the inevitable dilution of the probable cause standards applied to warrant applications. In any given case, even a highly qualified federal magistrate may erroneously evaluate an affidavit and find a showing of probable cause where none exists. If this occurs in a marginal case, a reviewing court may acknowledge its own doubts regarding probable cause, but defer to the magistrate's finding. This occurs where the reviewing court finds the magistrate's finding to be based upon some corroboration which "reduced the chances" that the informant's tip was a "reckless or prevaricating tale," thus providing a substantial basis for crediting a hearsay tip. *See Gates*, 103 S. Ct. at 2335. In such a case the trial court would not suppress the evidence.

Ultimately, a lower practical standard for issuance of warrants will begin to emerge. This development — "an evisceration of the probable cause standard" — was recognized by Justices White, Brennan and Marshall in their *Gates* opinions. *Gates*, 103 S. Ct. at 2350 (White, J., concurring), 2359 (Brennan, J., dissenting). As magistrates and police officers come to rely upon this reduced standard for probable cause, affidavits inevitably will be presented which fall even further from true probable cause yet come close to the diluted standard. Given the flexibility of the "fluid" totality of the circumstances test, magistrates will be inexorably drawn to approval of such warrant requests. Judicial review of their determinations is essential to rein in this tendency toward dilution of the probable cause standard.

5. The Potential of Reversal Is a Strong Incentive for Strict Application of the Probable Cause Standard by Magistrates.

The trend toward increasing dilution of the probable cause standard applied to warrant applications by magistrates would not only go unchecked, but would be exacerbated by the virtual elimination of any judicial review of their decisions. It has been observed that a magistrate is "surely more careful because he knows that his probable cause determinations may be reviewed on a motion to suppress."[20] In *United States v. Karathanos*, 531 F.2d 26, 33 (2d Cir.), *cert. denied*, 428 U.S. 910 (1976), the Second Circuit rejected the proposal advocated by Petitioner in this case, reasoning:

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[20]Mertens & Wasserstrom, *supra*, 70 GEO. L.J. at 456.

> While we do not assume that United States magistrates or state officials authorized to issue search warrants are necessarily prone to act as the "rubber stamp[s] for the police" condemned in *Aguilar v. Texas*, [*supra*, 378 U.S. at 111], the exclusionary rule's effect of making them aware that their decision to issue a search warrant is a matter of importance not only in regard to the constitutional rights of the person to be searched, but also in regard to the success of any subsequent criminal prosecution, may well induce them to give search warrant applications the scrutiny which a proper regard for the Fourth Amendment requires.

This incentive is removed by a "reasonable good faith" exception, in which reasonable reliance on the warrant by the police officer would have the same legal effect as a correct probable cause determination by the magistrate.

As explained *infra* at 26-29, under petitioner's proposal reviewing courts will avoid addressing the application of the probable cause standard to the facts presented to a magistrate. However, even if courts were able and inclined to give such advisory opinions, the lack of any effect on the outcome of the case will render such guidance meaningless to the magistrate. As observed by retired Justice Stewart:

> There are constitutional questions about this approach, but let us assume that courts may admit evidence obtained in reasonable good faith while declaring that the warrant pursuant to which it was obtained was not supported by probable cause. Where this is done, the magistrate may receive an opinion, perhaps years after signing the warrant, informing him that a mistake was made. But there is no incentive — apart from a professional desire to comply with the fourth amendment — for that magistrate to refrain from repeating the same mistake in the future or from granting any colorable request for a search warrant.

Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1403 (1983).

6. Without Judicial Review, Magistrates Will Tend to Accede to Pressures From Law Enforcement, and Increasingly Act as Mere Rubber Stamps.

An uninformed or uneducated magistrate in the heat of a hurried request for authority to seize evidence of a crime, can be counted on to yield to pressures from law enforcement officers in *ex parte* proceedings. One

commentator who conducted a nationwide study of misdemeanor courts has observed:

> The non-lawyer judge appears to be more willing to assume the role of prosecutor when the prosecuting attorney is not present. However, when the prosecution is present, the non-lawyer judge tends to be more likely to succumb to pressures from the prosecuting attorney.[21]

A recent study of Virginia magistrates revealed that:

> . . . 11.4 percent of the magistrates and chief magistrates responding indicated that their personal philosophy concerning the issuance of criminal warrants amounted to rubber-stamping. These magistrates indicated that they felt the standard for issuance of criminal warrants should be: "The police have the best knowledge of the facts of the case. If brought to trial, the judge will try the case on its merits. Therefore, the magistrate should generally issue the warrant."

NATIONAL CENTER FOR STATE COURTS, VIRGINIA COURT ORGANIZATION STUDY, Chap. II at 16 (1979).

This phenomenon was a central factor in a decision rejecting issuance of search warrants by non-attorney magistrates in California:

> [T]he potential inability of a layman to appreciate the subtleties of search and seizure questions casts grave doubt upon the ability of a layman judge to meet the required qualification of not only being capable of probable cause determination but also of being neutral and detached. . . . [T]he nonattorney judge is likely to rely heavily on law enforcement personnel for guidance in his decision making when it becomes obvious that his own experiences are so limited as to be of little assistance to him in resolving the probable cause question before him on a request for a search warrant.

People v. Escamilla, 65 Cal. App. 3d 558, 563, 135 Cal. Rptr. 446, 449 (1976).[22]

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[21]J. Alfini, transcript of speech delivered at Lay Judge Seminar held at New York University, April 1978 (quoted in NON-ATTORNEY JUSTICE, *supra*, at 14).

[22]However, a later California decision indicates that non-attorney magistrates may issue warrants. *People v. Mack*, 66 Cal. App. 3d 839, 845-46, 136 Cal. Rptr. 283, 288-89 (1977).

The tendency to succumb to law enforcement pressures is not limited to non-attorney magistrates.

> [E]ven in the unusual case where law enforcement officials do seek a warrant, the judicial officer's participation is "largely perfunctory" — it is "notoriously easy" to obtain search warrants or court orders for electronic surveillance, and even easier to obtain warrants for arrest. Thus, almost always the first and only meaningful opportunity to decide the legality of a search or seizure arises after the fact.

Kamisar, *The Exclusionary Rule, supra,* 16 CREIGHTON L. REV. at 569-70 (footnotes omitted).[23]

The existence of "rubber stamp" magistrates has long been acknowledged. In a very recent study of the search warrant process conducted by the National Center for State Courts, the magistrate who received the most warrant applications in one subject city acknowledged that he had rejected only one search warrant application in 15 years as a judge. Rejections by surveyed judges ranged from about half to "almost never." R. VAN DUIZEND, L. P. SUTTON & C. CARTER, THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, PRACTICES 2-12, 2-13 (1983) (draft only) [hereinafter cited as VAN DUIZEND, THE SEARCH WARRANT PROCESS].[24] The study found that "it was the nearly universal perception among police officers, prosecutors, and judges in all of our cities that very few applications are turned down by magistrates regardless of the [pre-application] screening procedures." *Id.* at 6-3. Many interviewed officers felt judges "often just skim the affidavits looking for key words and phrases." *Id.* at 3-6. In spite of the integrity and outstanding ability of many federal magistrates, it is unlikely that the "rubber stamp" approach is limited to the state court systems. In a related context, out of 5,563 federal and state wiretap authorization requests from 1969 through 1976, only 15 applications were rejected.[25]

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[23]*See also* White, *Forgotten Points in the "Exclusionary Rule" Debate*, 81 MICH. L. REV. 1273, 1282 n.32 (1983) (observing that the independence and neutrality of magistrates "are in fact ensured only by the kind of review of their judgments that the exclusionary rule makes possible").

[24]This study was conducted under a grant from the National Institute of Justice. A copy is on file with the Clerk of the Court.

[25]H. SCHWARTZ, TAPS, BUGS, AND FOOLING THE PEOPLE 23 (1979). At hearings before the National Wiretap Commission, one prosecutor stated "I have not found one judge who takes the time to read an *ex parte* wiretap application." *Id.*

The tendency of some magistrates to yield to pressures from police is in part due to the time pressures on magistrates when called upon to issue a warrant. Normally the requesting officer is hurried, in the heat of an investigation, and anxious to obtain the warrant before the evidence disappears. The magistrate is commonly also strapped for time due to his regular caseload.[26] One recent study found the median time spent reviewing a search warrant is two minutes and twelve seconds; 25% of the proceedings took less than 90 seconds, and 71.3% took under three minutes. Only 8.3% of the warrant applications were rejected.[27] Under these circumstances, judicial review of the warrant process is critical to provide any meaningful assurance of a reasonable basis for issuance of a warrant.

7. No Alternative Controls Can Assure Magistrate Compliance With Fourth Amendment Standards.

In advocating what will amount to the end of judicial review of magistrates' decisions Petitioner asserts that judicial officers considering warrant applications are "presumably" motivated to reach a correct decision; that the training required for federal magistrates "enhance[s] the presumption of propriety;" and that this enhancement also applies to state court judges. P. Br. at 60 & n.22. As demonstrated above, the assumption that state court judges necessarily have any legal training is fallacious. Moreover, a law degree is no guarantee that a judge will properly make a delicate determination of probable cause under pressures from the police in an extremely limited amount of time and without any concern about future scrutiny of his decision.

Petitioner also naively asserts that where a particular magistrate serves as a mere "rubber stamp," he or she could be removed from office pursuant to 28 U.S.C. § 631(i) (Supp. 1983). Regardless of how ethereal this remedy may be, it seems far more draconian than the exclusionary rule. Moreover, like the issuing judge in this case, most state judges are

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[26]The Los Angeles Municipal Court with annual filings of about 130,000 (excluding parking and traffic) *finds itself so pressed that in large areas of its caseload it averages but a minute per case in receiving pleas and imposing sentence.*

Barrett, *Criminal Justice: The Problem of Mass Production*, in THE AMERICAN ASSEMBLY, COLUMBIA UNIVERSITY, THE COURTS, THE PUBLIC AND THE LAW EXPLOSION 85, 117-18 (H.W. Jones ed. 1965) (emphasis in original).

[27]VAN DUIZEND, THE SEARCH WARRANT PROCESS, *supra*, at 2-13, 2-14.

elected to office.[28] Their removal from office would certainly be problematic, if not impossible. Civil sanctions would also be unavailable, because the warrant-issuing magistrate is immune from suit. *Stump v. Sparkman*, 435 U.S. 349, 363 n.12 (1978).

Eliminating any meaningful review of a magistrate's determination of probable cause is a high price to pay for the amount of otherwise inadmissible evidence seized pursuant to a warrant unsupported by any substantial basis for probable cause. However, this is not the only "cost" of the proposed reasonable, good faith reliance exception.

B. The Proposed Exception Would Undermine the Protections and Procedures Mandated by the Fourth Amendment in Numerous Other Ways.

1. A Reasonable Good Faith Reliance Test Would Remove Police Incentives to Comply With the Warrant Clause Requirement of Probable Cause.

The deterrent function of the exclusionary rule acts not as a punitive sanction for misconduct, but rather, serves to remove or dramatically reduce any incentive to avoid compliance with the Fourth Amendment. This was made clear in the first case the Court decided explicitly on the deterrence rationale: "The rule is calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960) (citation omitted).[29]

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[28]As observed by the Second Circuit in rejecting the proposed good faith exception, the "suggestion that 'magistrate-shopping' or patronization by the police of lenient or 'rubber stamp' justices of the peace could be remedied by removal of the offenders ignores the fact that many state officials entitled to issue search warrants are elected to office." *United States v. Karathanos*, 531 F.2d 26, 34 (2d Cir.), *cert. denied*, 428 U.S. 910 (1976).

[29]*See also* LaFave, *The Fourth Amendment in An Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307, 353 (1982) [hereinafter cited as LaFave, *The Fourth Amendment*]:

> Once again, it is necessary to begin with the right question, which is whether admitting the evidence in such instances [i.e., good faith reasonable reliance on a search warrant] would create an additional incentive to infringe upon fourth amendment rights. I see no basis for assuming the answer to be other than yes.

Adoption of a reasonable good faith exception where officers have procured a warrant would remove their current incentive to make sure the warrant will "hold up in court" by careful compliance with the requirements of probable cause. Professor Ball, a leading advocate of the good faith exception relied upon by Petitioner, concedes that a "signal from the Court that it is abating its aggressive enforcement of fourth amendment requirements is apt to evoke a consistent response from the police."[30] An extensive study of the New York City Police Department yielded "substantial evidence that the police themselves would not respect courts which did not support constitutional standards by excluding any evidence which was unconstitutionally obtained. . . . [T]o the police, the imposition of the exclusionary rule is a prerequisite for the imposition of a legal obligation."[31]

Retired Justice Stewart has recently expressed his agreement with this conclusion. In rejecting the proposed reasonable good faith exception, he states:

> [I]f this exception were adopted, police officers might shift the focus of their inquiry from "what does the fourth amendment require?" to "what will the courts allow me to get away with?" It seems inevitable in these circumstances that adoption of the proposed exception would result in more fourth amendment violations.

Stewart, *supra*, 83 COLUM. L. REV. at 1403 (footnote omitted).

This reasoning was recently adopted by the Court in *United States v. Johnson*, 457 U.S. 537, 561 (1982) in rejecting the argument that retroactive exclusion of evidence could have no deterrent effect:

> If, as the Government argues, all rulings resolving unsettled Fourth Amendment questions should be nonretroactive, then, in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior. Official awareness of the dubious constitutionality of a practice would be counterbalanced by official certainty that, so long as the Fourth Amendment law in the area remained unsettled, evidence obtained through the questionable practice would be excluded only in the one case definitively resolving

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[30]Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635, 656 (1978) (footnote omitted).

[31]Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. REV. 24, 29 (1980).

> the unsettled question. Failure to accord any retroactive effect to Fourth Amendment rulings would "encourage police or other courts to disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided approach."

Id. at 561 (footnote, citation and emphasis omitted).

a. Magistrate Shopping.

Just as some magistrates apply a more lenient standard of probable cause than others, "[s]ome magistrates vary their requirements for a search warrant with the seriousness of the suspected offense."[32] As a result of the variance in standards applied, police frequently engage in "magistrate shopping." "Empirical studies have shown that 'police "shop around" for a magistrate who is lenient' and that there is 'substantial disparity between magistrates as to how much evidence is required to obtain a search warrant.' " LaFave, *The Fourth Amendment, supra*, at 353 (1982) (footnote omitted.)[33]

The fact that officers obtain a warrant demonstrates their desire to secure evidence which will be admissible at trial. With no threat of suppression due to a weak warrant application, any incentive to avoid an overly lenient magistrate would be removed.

> If a magistrate's issuance of a warrant were to be, as the government would have it, an all but conclusive determination of the validity of the search and of the admissibility of the evidence seized thereby, police officers might have a substantial incentive to submit their warrant applications to the least demanding magistrates, since once the warrant was issued, it would be exceedingly difficult later to exclude any evidence seized in the resulting search even if the warrant was issued without probable cause. . . . For practical purposes, therefore, the standard of probable cause might be diluted to that required by the least demanding official authorized to issue warrants, even if this fell well below what the Fourth Amendment required.

United States v. Karathanos, 531 F.2d at 34.

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[32]L. TIFFANY, D. MCINTYRE & D. ROTENBERG, DETECTION OF CRIME 119 (1967).

[33]*See also* Mertens & Wasserstrom, *supra*, 70 GEO. L.J. at 456 n.507.

b. Thorough Investigation and Internal Review.

The insulated nature of a warrant under a reasonable, good faith reliance test would also remove incentives for police to conduct thorough pre-search investigations to bolster their showing of probable cause. As warrants are upheld despite showings of less than probable cause, police will learn that more adequate showings are simply not necessary.[34]

A reasonable reliance exception would also remove the incentive for internal reviews of warrant applications by police and prosecutors. One empirical study found that the prevailing practice in large cities is for all warrant applications to be reviewed by prosecutors before they are submitted to the magistrate, because police "want to be certain that the

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[34]As observed by Professor LaFave:

> [T]he risk in such tampering with the exclusionary rule "is that police officers may feel that they have been unleashed" and consequently govern their future conduct by what passed the good faith test in court rather than on the traditional fourth amendment standards of probable cause, exigent circumstances, and the like. . . . Professor Steven Schlesinger, a staunch opponent of the exclusionary rule, recently concluded that the "good faith" proposal "provides little or no deterrence for violations deemed by the courts to be in good faith" because it fosters "a careless attitude toward detail on the part of law enforcement officials" and encourages "police to see what can be gotten away with before the courts draw the line on what is an intentional violation."

La Fave, *The Fourth Amendment, supra*, 43 U. PITT. L. REV. at 358 (footnotes omitted).

The "good faith" carelessness of warrant applicants was illustrated in *Kaylor v. Superior Court*, 108 Cal. App. 3d 451, 454-56, 166 Cal. Rptr. 598, 599-600 (1980). The search warrant affidavit contained two sentences, stating that probable cause was established by 155 pages of attached police reports, many of which were "hard to read if they could be read at all." The issuing magistrate was annoyed at the time a thorough review would take, and admitted he did not bother to read all of the reports.

Another telling illustration is the comment of the searching officer in *Illinois v. Gates*, who conceded, prior to this Court's ruling, that in retrospect, if he had understood the exclusionary rule as well then as he does now, he would have conducted a surveillance to better corroborate the anonymous informant's letter before seeking the warrant. CHICAGO LAW., Jan. 1983, at 7. While the officer's salutary concern may have been ultimately undermined after *Gates*, such concerns will be totally erased by a good faith exception whenever a warrant is signed.

procedure is entirely lawful" and will stand up in court.[35] A recent study of warrant application procedures in seven cities found that in every city applications were first reviewed by a prosecutor or police supervisor, and in one city were normally drafted by the prosecutor. VAN DUIZEND, THE SEARCH WARRANT PROCESS, *supra*, at 2-7, 2-8. In ten to fifty percent of the cases, the affiant was asked to add additional information as a result of the internal screening process. *Id.* at 2-7.[36]

The Attorney General of Maryland, who is also a former United States Attorney, ascribes major importance to the exclusionary rule in encouraging internal prosecutorial review of warrant procedures, and describes daily conferences between law enforcement officers and prosecutors regarding the application of Fourth Amendment requirements to case facts. He concludes that:

> [t]he principal, perhaps the only, reason those conversations occur is that the assistant and the agent want the search to stand up in court . . . .
>
> These contacts do not occur because of some self-limiting controls in the police and prosecutors themselves. I hope and trust that most of us in law enforcement are principled enough to avoid violating the clear constitutional rights of suspects. But in the heat of the chase, and in the absence of effective sanction, I believe that we would define those rights somewhat narrowly.

Sachs, *The Exclusionary Rule: A Prosecutor's Defense*, CRIM. JUST. ETHICS, Summer-Fall 1982, at 28, 30.

A reasonable reliance exception would remove any incentive for this important process of internal review. Rather than assuring that the warrant will be ultimately upheld as within the requirements of the Fourth Amend-

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[35]L. TIFFANY, D. MCINTYRE & D. ROTENBERG, THE DETECTION OF CRIME, *supra*, at 114.

[36]*See also* Miller, *Telephonic Search Warrants: The San Diego Experience*, 9 PROSECUTOR 385, 385 (1974) (San Diego County officers seeking search warrants must first contact a deputy in the District Attorney's office). The frequency of this practice is further indication why an inquiry about "reasonable good faith" must extend beyond the officer who executed the warrant. *See infra* discussion at 34-35. *See also* Kamisar, *Public Safety and Individual Liberties: Some "Facts" and "Theories,"* 53 J. CRIM. L. & CRIMINOLOGY 171, 179-82 (1962) (noting creation and development of working relationships between police and prosecutors to ensure the obtaining of evidence by means which would not result in its suppression).

ment, police need only focus on obtaining a magistrate's signature. Any further showing beyond the most lenient (and perhaps misconceived) standard of some substantial basis for probable cause will invariably come to be perceived by police as a wasted effort.[37]

2. The Proposed Exception Would Encourage Police Ignorance of the Law.

The exception proposed by Petitioner takes the novel approach of focusing upon the reasonable belief of the police officer, instead of the magistrate, as to probable cause for the warrant. This focus puts a premium on police ignorance of the law, a consequence which has led a number of opponents of the exclusionary rule to oppose a "reasonable good faith" exception.[38] With the assurance that evidence will be admissible where an officer has "reasonably" relied upon a warrant, police departments will invariably tend to train officers that if the warrant is signed, it is reasonable to rely on it.[39] Absent the current danger of suppression, if there is any question about a warrant's validity police would have every reason to adopt the "let's-wait-until-it's-decided" approach recently condemned in *United States v. Johnson*, 457 U.S. at 561. As a result, individual officer's beliefs and departmental policies will predictably shift

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[37]The Van Duizend study of the warrant process in seven cities concluded that applying a good faith exception to the exclusionary rule where an officer relies upon a warrant

> would further encourage police officers to seek out the less inquisitive magistrates and to rely on boilerplate formulae, thereby lessening the value of search warrants overall. Consequently, the benefits of adoption of a broad good faith exception in terms of a few additional prosecutions appears to be outweighed by the harm to the quality of the entire search warrant process and the criminal justice system in general.

VAN DUIZEND, THE SEARCH WARRANT PROCESS, *supra*, at 8-12.

[38]Judge Wilkey, a staunch opponent of the exclusionary rule, concludes that "[t]he 'good faith' exception puts a premium on ignorance and lack of training in law enforcement agencies." WILKEY, ENFORCING THE FOURTH AMENDMENT BY ALTERNATIVES TO THE EXCLUSIONARY RULE 36 (1982). *See also* Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1044 (1974).

[39]Professor LaFave notes a number of decisions "indicating that an officer may quite properly be held to have acted in 'good faith' when his misunderstanding of his fourth amendment authority was prompted by information conveyed to him by his department concerning that authority." LaFave, *The Fourth Amendment, supra*, 43 U. PITT. L. REV. at 344 (footnote omitted).

toward institutionalized ignorance aimed at rendering "reasonable" an officer's reliance on an unreasonable warrant.

3. A Reasonable, Good Faith Exception Would Freeze Development of Fourth Amendment Law.

As recognized recently in *Owen v. City of Independence*, 445 U.S. 622, 651 n.3 (1980), a rule preventing challenge to unconstitutional conduct except in the most egregious cases "could also have the deleterious effect of freezing constitutional law in its current state of development." *See also United States v. Peltier*, 422 U.S. 531, 554 (1975) (Brennan, J., dissenting) (excluding good faith actions by police from exclusionary rule "could stop dead in its tracks judicial development of Fourth Amendment rights").

Magistrates who make daily determinations of probable cause are particularly reliant upon appellate guidance in developing coherent standards. This process for expounding and explaining probable cause is especially important in the immediate wake of *Illinois v. Gates*, since the notion of a fluid concept derived from the totality of the circumstances gives little guidance to magistrates faced with infinite circumstantial permutations. While each case must obviously be decided on its own facts, examples of appropriate application of the totality of the circumstances test in various factual settings are critical to inform magistrates faced with similar situations.

Adoption of an exception focusing on the reasonable reliance on a warrant by an officer would relegate all judicial guidance regarding the probable cause standard, or other Fourth Amendment issues, to mere advisory opinions rendered at the option of the court. Such opinions would be inconsistent with Article III of the Constitution.[40]

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[40] *See, e.g., Bowen v. United States*, 422 U.S. 916, 920 (1975) (criticizing Ninth Circuit on Article III grounds for ruling on illegality of a search, when decision on retroactivity of *Almeida-Sanchez v. United States*, 413 U.S. 916 (1975) made constitutional ruling unnecessary); *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) ("federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them"); *Stovall v. Denno*, 388 U.S. 293, 301 (1967) (Article III precludes announcing purely prospective rule of law without application to case in which rule is announced); *NAACP v. Alabama*, 357 U.S. 449 (1958); *Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) ("The court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."). *See also* Mertens & Wasserstrom, *supra*, 70 GEO. L.J. at 450.

Aside from the Article III problem, in practice, courts applying a "good faith" exception will tend to limit their review to how far the officer's conduct exceeded the reasonably perceived objective limits of the law. As a result, there would be no need to re-examine the proper boundaries of the limits themselves in the course of determining the officer's reasonableness. Courts will use this analysis to avoid deciding close and difficult issues of probable cause.[41]

Thus only egregious police misconduct would be clearly categorized as violative of the Fourth Amendment. This is conceded by the Petitioner, who asserts that lost decision-making opportunities would be confined to " 'the grey, twilight area[s]' of Fourth Amendment law where the constitutional violation, if any, is minimal." P. Br. at 82. One wonders whether there can be a "minimal" constitutional violation. The "grey" areas mark the forefront of the development of Fourth Amendment law, and are precisely the areas where judicial guidance is needed most.

Petitioner's implication that every core value under the Fourth Amendment has been settled is belied by history. As noted recently in *United States v. Johnson*, 457 U.S. at 560, "[b]ecause this Court cannot rule on every unsettled Fourth Amendment question, years may pass before the court finally invalidates a police practice of dubious constitutionality." (Citation omitted.) The contention that the exclusionary rule is unnecessary because the bulk of Fourth Amendment violations have been eliminated was made over ten years ago in litigating *California v. Krivda*, 409 U.S. 33 (1972).[42] Yet in the last eight years alone this Court has applied the

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[41]Even if not precluded from rendering advisory opinions, appellate courts regularly avoid deciding a constitutional issue where it is not necessary to the outcome of a case. A recent empirical study of the decision-making process in California appellate courts found that reviewing courts utilize "norms of affirmance" — such as the substantial evidence rule and harmless error rule — to avoid inquiry into the validity of factual findings below. Davies, *Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal*, 1982 AM. B. FOUND. RESEARCH J. 543, 551 (1982). The study found these norms play a significant role in avoiding reversals due to search and seizure issues. For example, findings of abandonment based on repeated and highly improbable police testimony that a suspect dropped contraband when approached by officers are normally upheld under the substantial evidence rule. *Id.* at 598-600, 638.

[42]Mertens & Wasserstrom, *supra*, 70 GEO. L.J. 365, 398 n.157 (citing Amicus Curiae Brief for Americans for Effective Law Enforcement, Inc., at 17).

exclusionary rule to compel police compliance in a broad array of protected contexts. In future years, courts will be required to define Fourth Amendment norms in any number of developing areas.[43]

A number of extremely important decisions which have dramatically altered police practices could never have been rendered if the Court relied on a reasonable, good faith exception. These include, for example, *Steagald v. United States*, 451 U.S. 204 (1981); *Ybarra v. Illinois*, 444 U.S. 85 (1979); *Torres v. Puerto Rico*, 442 U.S. 465 (1979); *Delaware v. Prouse*, 440 U.S. 648 (1979); *Chimel v. California*, 395 U.S. 752 (1969); and *Katz v. United States*, 389 U.S. 347 (1967). In each, a plausible claim that the officer's transgression was not committed in "bad faith" would doubtless have been made because the search or seizure found support in statute (*Ybarra* and *Torres*), because it was part of an apparently routine practice that had not been specifically condemned (*Prouse*), or indeed because it appeared to have been approved in earlier decisions of the Court (*Katz* and *Chimel*) or circuit courts (*Steagald*). Yet the importance of these decisions for the development of Fourth Amendment norms and protection of Fourth Amendment values can hardly be questioned.

Moreover, a reasonable good faith exception would effectively eliminate any incentive to challenge dubious police practices in court. Petitioner asserts without any basis in fact or logic that the number of Fourth Amendment challenges would not decline under the proposed exception. P. Br. at 83.[44] The pragmatic realities are to the contrary. In any but the most egregious cases, particularly where search warrants are concerned, any constitutional ruling would be simply advisory and would only apply prospectively, if at all, to future litigants. Few criminal defendants have the resources to finance litigation which will have no bearing on the outcome of their cases; fewer still will be inclined to divert valuable time

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[43]The "grey areas" which will require clear definitions of Fourth Amendment boundaries include, for example, new technological advances such as use of parabolic microphones and microwaves by police to eavesdrop on private conversations, or the expansion of allowable police intrusions on less than probable cause as in *Michigan v. Summers*, 452 U.S. 692 (1981) or *United States v. Place*, _____ U.S. _____, 103 S. Ct. 2637 (1983). A good faith exception would excuse questionable police conduct in these and other areas, severely limiting the development of essential guidelines.

[44]This assertion is in obvious conflict with the argument that litigation of suppression motions currently places an unwarranted burden on the judicial system. P. Br. at 74.

and energy away from the defense of their cases in order to settle constitutional issues of only abstract interest. Even assuming a court were able and willing to make difficult Fourth Amendment rulings unnecessary to the decision in a case, it would find few opportunities to do so.[45]

4. A Reasonable Good Faith Exception Will Allow Other Violations of the Warrant Clause to Go Unchecked.

The Petitioner argues that an exception for reasonable good faith reliance on a search warrant is compelled because the only rationale for the exclusionary rule is to deter misconduct by the police. As a result, suppression of blatantly unreasonable warrants would be based upon the police officer's objectively unreasonable reliance on the warrant where "no well-trained officer could reasonably have thought that a warrant should issue." P. Br. at 66 n.28.[46]

The logical extension of this reasoning shows that the exception would swallow the Warrant Clause. The exception, to remain logically coherent, would have to extend to violations of the constitutional requirement that items to be seized be described with particularity. This violation might occur in one of two ways: (1) the warrant may fail to adequately describe the items to be seized, i.e., an impermissible general warrant, or (2) the warrant may purport to authorize seizure of items in addition to those for which there is probable cause, i.e., an overbroad warrant. In either case, the error is attributable to the magistrate who issued the faulty warrant. Since the officer who relies on such warrants could not be held responsible for errors in describing the property to be searched and/or seized, or in defining the scope of the authorized search and/or seizure, violations of the particularity clause would go unchecked, rendering that requirement a nullity.

The rationale of the proposed exception would also extend to, and undermine, the requirement of a neutral and detached magistrate.[47] Where

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[45]On the other hand, the government will have every incentive to argue for extension of the good faith exception whenever evidence might be suppressed. It follows that development of the law, like a one-way ratchet, will move in only one direction — the abbreviation of judicial enforcement of Fourth Amendment protections. *See* Mertens & Wasserstrom, *supra*, 70 GEO. L.J. at 453.

[46]Petitioner fails to indicate how a court decides the standards for a "well-trained officer," or his "reasonable" beliefs regarding a warrant. *See infra* discussion at 30-36.

[47]Petitioner impliedly concedes this is true. P. Br. at 62.

a magistrate has become a mere "rubber stamp," is swayed by a close personal working relationship with the applicant (as may be quite common in a wide variety of settings), is somehow affiliated with law enforcement, or is paid according to the number of warrants issued, he may nonetheless issue a warrant to an executing officer acting in good faith. The rationale espoused by Petitioner would sanction the use of warrants in these circumstances, despite the lack of a neutral and detached magistrate. A number of cases condemning this practice involved no evidence of actual or objectively recognizable bad faith; the Court condemned the warrant because of the potential for collusion proscribed by the drafters of the Fourth Amendment.[48]

In each of these cases, an argument could be made that the magistrate who issued the warrant was in fact acting in a neutral and detached manner, and that reliance upon the warrant was objectively reasonable and perhaps statutorily authorized. Failure to exclude the evidence in such cases would allow the practice to continue unchecked, at least until a court issues an advisory opinion specifically addressing the precise factual situation. In practice, the requirement of a neutral and detached magistrate would become functionally meaningless. The good faith exception would conceivably apply to a case where a warrant was not issued by a neutral and detached magistrate, was not supported by probable cause, and did not particularly describe the place to be searched or the items to be seized. By adopting such an exception, the Court will have functionally abdicated its control over compliance with the Warrant Clause.

5. A Reasonable, Good Faith Reliance Test Involves an Unworkable Standard With a Subjective Component and Complex Problems of Proof.

In light of the insurmountable procedural and substantive problems created by the proposed "reasonable, good faith" exception, it is understandable that Petitioner urges that "practical details" of the proposal would be "best left to future cases and initial resolution by lower courts." [P. Br. at 77] The problems raised in applying the proposed exception

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[48]*See, e.g., Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 327 (1979) (town justice who issued warrant and participated in search acted in role of "adjunct law-enforcement officer"); *Connally v. Georgia*, 429 U.S. 245, 250 (1977) (justice of peace who is paid only if warrant issued presumed not neutral and detached); *Coolidge v. New Hampshire*, 403 U.S. 443, 449-53 (1971) (state attorney general who issued warrant not neutral and detached).

are far more than 'practical details,' and the wiser course is to consider the ramifications and the resulting inordinate expenditure of judicial resources before adopting such a sweeping proposal. The adoption of the exception would transform relatively limited hearings involving search warrant challenges into complex, time consuming evidentiary presentations.[49]

Petitioner urges that the reasonable good faith exception should be an objective test, without spelling out how the test would work. While this proposal is doctrinally attractive, it is not workable or logically coherent. The essence of Petitioner's argument is that the exclusionary rule cannot deter an officer who believes in good faith that his conduct is within constitutional bounds. This assumes the officer's good faith belief; without it, he clearly can be deterred by the rule. It follows that the application of the proposal necessarily has a subjective component. This has been recognized in the cases adopting the rule and relied on by Petitioner. *See, e.g., United States v. Williams*, 622 F.2d 830, 840, 841 n.4a (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981) (exception applies only on showing of reasonable mistake *and* good faith belief conduct was legal); *United States v. Mahoney*, 712 F.2d 956, 960 (5th Cir. 1983)[50] ("The first inquiry under *Williams* is whether Mahoney's arresting officers had a subjective, good faith belief that their actions were legal.").[51] The

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[49]A perhaps extreme example of such a hearing, under the facts involved in *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981), is depicted in Mertens & Wasserstrom, *supra*, 70 GEO. L.J. at 418-23.

[50]The *Mahoney* case observed that *Williams* did not address application of a good faith exception to search warrants. *Mahoney* applied the exception to a technically defective arrest warrant which, though supported by probable cause, failed to adequately describe the arrestee. In limiting its holding to that type of warrant defect, the *Mahoney* court noted:

> We do not face here the fit of *Williams* to an arrest or search by officers holding a warrant found deficient for lack of probable cause. We leave for later the question of whether a good faith proviso to the exclusionary rule ought ever to tolerate an arrest or seizure without probable cause measured objectively.

United States v. Mahoney, 712 F.2d at 960 n.4.

[51]*See also United States v. Nolan*, 530 F. Supp. 386, 399 (W.D. Pa. 1981) ("Of course, any good faith exception must rest on a finding that the officer is in fact well trained."); *United States v. Wilson*, 528 F. Supp. 1129, 1132 (S.D. Fla. 1982) (applying exception based on finding of actual subjective good faith).

necessity of a subjective inquiry is also recognized by those state courts which have acknowledged the exception.[52]

The commentators cited by Petitioner as advocates of the proposed exception uniformly acknowledge that its application would require a subjective inquiry. As Professor Ball admits, "[u]nder the good faith exception, evidence would be suppressed as illegal unless the officer could establish *both* a good faith belief and a reasonable basis for that belief."[53] Petitioner relies heavily upon the observations of Professor Kaplan, yet he ultimately rejects the proposed exception because it would necessarily include a subjective test, adding one more fact-finding function subject to police perjury and unreviewable and untrustworthy findings by lower courts opposed to applying the exclusionary rule.[54]

By focusing on a deterrent rationale aimed only at police officers, Petitioner hopes to limit inquiry to the objective reasonableness of an officer's understanding of the law. This formulation appears to lend itself to a simple application which would, no doubt, become the law as understood by the police officer on the street: if you have a search warrant, the search will be "legal." One immediate problem is how to exclude from the exception warrants based on conclusory affidavits as in *Nathanson*,

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[52]In *People v. Adams*, 53 N.Y.2d 1, 422 N.E.2d 537, 439 N.Y.S.2d 877 (1981) the court applied the exception to officers' reasonable reliance on an individual's apparent authority to consent to a search, but observed this reliance must also be in good faith, and police must make some inquiry into the individual's actual authority before reasonably relying on her consent. *Id.* at 9-10, 422 N.E.2d at 541, 439 N.Y.S.2d at 881. *See also Gifford v. State*, 630 S.W.2d 387, 391 (Tex. Crim. App. 1982) observing the exception is based on evidence of actual good faith.

[53]Ball, *Good Faith and the Fourth Amendment*, 69 J. Crim. L. & Criminology, 635, 653 (1978). *See also* Carrington, *Good Faith Mistakes and the Exclusionary Rule*, CRIM. JUST. ETHICS, Summer-Fall 1982, at 35, 38 ("[I]t has been made patent that the test for admissibility must be two-pronged. First, the officer must allege that he believed he had probable cause to do whatever he did."); Schroeder, *Deterring Fourth Amendment Violators: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361, 1420 (1981) (exception would not apply where officer "in bad faith oversteps the bounds of his authority").

[54]Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1045 (1974).

and *Aguilar*, or other affidavits clearly lacking in probable cause,[55] such as the application to search Respondent Leon's house.[56] This requires an examination of whether the officer's reliance on the warrant was "reasonable."[57] In turn, this determination would require an extrapolation of existing law, and analysis of the extent to which governing principles are "predictably articulated." [*See* P. Br. at 81] The reviewing court must then examine the inferences a reasonably trained officer would draw.[58]

This proposal does not address the standards used in determining whether a legal doctrine is "predictably articulated," or the question of to whom the law must be predictable. Similarly, there is no standard for defining a well-trained officer. Training standards for police vary wildly in different jurisdictions,[59] and the reasonable understanding and inferences drawn from current law by, for example, an FBI agent in Washington, D.C., will obviously differ from the understanding and inferences of a deputy sheriff in a remote rural setting. Definition of a reasonable understanding and inference simply adds a layer of complexity to search warrant litigation.

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[55]Justice White would exclude from the good faith exception warrants "so clearly lacking in probable cause that no well-trained officer could reasonably have thought that a warrant should issue." *Gates*, 103 S. Ct. at 2346 (White, J., concurring). This formulation begs the question of how such warrants can be objectively defined.

[56]*See infra* discussion at 70-73.

[57]This formulation assumes that it would be objectively reasonable for an officer to rely on certain warrants which cannot be supported by any substantial basis for a fair probability that the sought items will be found, while conceding that reliance on other warrants would *not* be objectively reasonable. This requires an arbitrary line to be drawn between "reasonably unreasonable" and "unreasonably unreasonable" warrants, an abstract and ethereal proposition.

[58]*See, e.g.*, W. LAFAVE, 1 SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 1.2, at 10 (1978).

[59]The vast difference in training between federal and state, and city and rural police officers was documented in the 1975 PRESIDENTIAL COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE 120, 137:

> Commission surveys show that there is substantial variance in the quality of police personnel in the United States. They indicate that, in general, law enforcement personnel meet their difficult responsibilities with zeal, determination, and devotion to duty. They also indicate that many actions of individual police officers and administrators are ill-conceived.

Another problem is determining what standard applies when the officer is from a different jurisdiction. Would, for example, a part-time volunteer deputy from a rural area be held to a higher standard when testifying in federal court in New York or Alaska, or to the different standard of understanding of current law prevalent in his home county? Where a state such as California has imposed stricter requirements of probable cause, what standard would apply to a state officer testifying in federal court or in another state jurisdiction?

Other issues would also need to be resolved. Would the objective standard of reasonableness be raised if the officer had conferred with one or more prosecutors prior to obtaining the warrant, as in this case? In order to encourage such internal review, should the reasonableness of the officer's reliance on a warrant be judged by an objective standard applicable to prosecutors? Is this standard any lower than actual probable cause? What standard for good faith reasonable reliance would apply where the affidavit purporting to establish probable cause is not attached to a warrant executed by an officer other than the affiant? Would it matter if the affiant intentionally had another officer execute the warrant because of doubts about the sufficiency of his factual showing of probable cause? Would it make a difference if the warrant application was previously rejected by a magistrate, or criticized by a prosecutor? Would it matter that the affiant brought his request to a magistrate he knew to be a "rubber stamp?" Hearings on these issues would necessarily require extended discovery and evidentiary presentations.

Moreover, a determination of the reasonableness of an officer's belief will necessitate inquiry not only into the predictability of the law's articulation in a given jurisdiction, but also require inquiry into the adequacy of an officer's training. The issues a court must address in this context are aptly detailed in Amicus Curiae Brief for National Legal Aid and Defender Association, at 21-22, *United States v. Leon*, No. 82-1771 (1983). This will require testimony from police supervisors in charge of the training and continuing education of line officers, adding yet another layer of complexity to motions to suppress, and imposing an unnecessary burden on the courts.[60]

Despite Petitioner's ingenuous assertion to the contrary, the reasonable good faith exception will necessarily involve inquiry into an officer's subjective good faith. *See, e.g., United States v. Williams*, 622 F.2d at

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[60]*See, e.g.*, Mertens & Wasserstrom, *supra*, 70 GEO. L.J. at 448.

840, 841 n.4a. The rationale for the exception is totally undermined by an officer who commits a sham mistake in bad faith which would nevertheless pass as "reasonable" under local standards. In that case, an officer may violate the Constitution and his own perceptions of what the Constitution requires, yet would Petitioner propose his "mistake" would be excused under an arbitrary objective standard of something less than probable cause? This would occur in any number of contexts. For example, the officer may believe that a warrant application which barely rises above the "bare bones" affidavit in *Nathanson* lacks any substantial basis for probable cause and reviewing courts might agree if they reached that question; yet the fact that a magistrate signed the warrant and that it contained various irrelevant facts that could be understood as "corroboration" would presumably render the officer's bad faith reliance on the warrant "objectively reasonable."[61]

The reasonable good faith exception would necessarily provide for subjective inquiry into issues of fraudulent behavior, such as intentional or reckless misstatements to the magistrate. *Franks v. Delaware*, 438 U.S. 154 (1978). Other areas similarly require subjective inquiry, such as where a reasonable warrant is obtained as a pretext for an overbroad search (*see, e.g., United States v. Rettig*, 589 F.2d 418 (9th Cir. 1978)), or for purposes of harassment of the subject of the search. The premium on the "reasonableness" of the officer's reliance on a warrant would extend this subjective inquiry even further. Allegations of magistrate shopping would undermine an officer's good faith in relying on an "objectively reasonable" warrant. A warrant obtained in bad faith by one officer might be "reasonably relied upon" by another officer who executes the search and is subjectively unaware of how the warrant was obtained. *Cf. Whiteley v. Warden*, 401 U.S. 560 (1971).

The inevitable time consuming subjective analysis will extend beyond the officer who obtains the warrant or performs the search. This will occur because any interpretation of good faith arguably consistent with the deterrence rationale of the exclusionary rule must extend beyond the indi-

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[61]Similar abuses requiring subjective inquiry are easy to hypothesize. An officer might add catch-all phrases to the list of items to be seized which are beyond the scope of probable cause, or intentionally expand the description of the area to be searched, with fair assurance that his "mistake" will be viewed as "objectively reasonable." Similarly, he may use boilerplate language in the affidavit to show the credibility and reliability of an informant with no genuine belief in the accuracy of his boilerplate assertions.

vidual officer. The exception would be undermined by an institutional policy of "wait and see" whether courts will find it unreasonable for officers to be unaware of a Fourth Amendment standard before promulgating it to officers. *Cf. United States v. Johnson*, 457 U.S. 537, 561 (1982). The required inquiry would involve not only the adequacy of officer training, but also the good faith of those who set department policy.

Petitioner attempts to deal with these problems by defining them out of existence and blindly asserting that the proposed exception will simply focus on an objective test of reasonableness. As demonstrated above and acknowledged by virtually every court and commentator addressing the issue, a subjective inquiry is inherent to a good faith exception and simply unavoidable.

Justice White has observed that "[s]ending state and federal courts into the minds of police officers would produce a grave and fruitless misallocation of judicial resources." *Illinois v. Gates*, 103 S. Ct. at 2347 (White, J., concurring) (citation omitted). Any fact-finding test aimed at an officer's subjective state-of-mind would present impossible problems of proof and could easily be manipulated by the witness. There is evidence that police already engage in a "perjury routine" at suppression hearings.[62] The potential for increased misrepresentations is enormous. As one commentator explains: "[I]t is unlikely that the 'good faith' exception would do anything to reduce police perjury. To the contrary, it is likely that adoption of the 'good faith' proposal would create *new* varieties of testimonial alteration." Fyfe, *In Search of the "Bad Faith Search,"* 18 CRIM. L. BULL. 260, 262 (1982) (emphasis added).[63] The problem of

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[62]Loewenthal, *supra*, 49 UMKC L. REV. at 35. *See also* Sevilla, *The Exclusionary Rule and Police Perjury*, 11 SAN DIEGO L. REV. 839, 869 (1974). As an *amicus curiae* in support of the state in *California v. Krivda*, 409 U.S. 33 (1972), Illinois urged abolition of the exclusionary rule "because it causes the police to perjure themselves in hundreds of cases." Oral argument for the state of Illinois as *amicus curiae* in *California v. Krivda*, 12 CRIM. L. REP. (BNA) 4034, 4036 (1972). Potential avoidance of the rule by the availability of a good faith exception would only exacerbate this problem.

[63]Fyfe points out that the danger of increased police perjury is caused not only by the good faith exception's necessary reliance on police testimony, but also by the risk of administrative discipline or civil liability faced by the officer as alternative deterrents under a good faith exception. *Id.* at 263-64.

reliance upon self-serving, untrustworthy, and generally uncontradicted police testimony is yet another obstacle to accurate fact-finding under a "reasonable good-faith reliance" exception.[64] It is doubtful that a police officer would ever testify he was not acting in good faith.[65]

6. A Reasonable, Good Faith Reliance Exception Ignores *Stare Decisis* and Would Wreak Havoc With Settled Precedent.

Adoption of a reasonable, good faith exception to the exclusionary rule would unquestionably throw years of precedent into chaos. Any number of cases decided by this Court since *Weeks* would not have been decided under a good-faith exception, and will become of questionable validity.[66] Numerous other cases are premised on the reviewability of magistrate's decisions.[67] Other cases are in direct conflict with the proposed exception and would be directly overruled. A few examples are illustrative.

In *Whiteley v. Warden*, 401 U.S. 560 (1971), an officer obtained an arrest warrant based on a "bare bones," conclusory allegation that Whiteley and Daley had committed a crime. *Id.* at 563. News of the warrant was duly broadcast over a state police radio network to an officer in another county. That officer, in reliance on the radioed warrant information, arrested Whiteley and conducted a search incident to the arrest, which produced contraband. *Id.* The Court found that the warrant was invalid, because the magistrate was supplied no facts to support an independent finding of probable cause. *Id.* at 565. The Court acknowledged that the arresting officer was entitled to reasonably rely on the radio information that a presumably valid warrant had issued, but held the arrest and subsequent search to be illegal. *Id.* at 568-69. The arresting officer unquestionably acted in good faith, reasonable reliance on the arrest warrant. Yet failure to exclude the illegally seized evidence would insulate the unreasonable warrant from challenge.

In *Ybarra v. Illinois*, 444 U.S. 85 (1979), officers executing a search warrant at a tavern frisked patrons who were present at the time of the

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[64]*See* W. LAFAVE, SEARCH AND SEIZURE, *supra*, at 10 (Supp. 1983); Ball, *supra*, 69 J. CRIM. L. & CRIMINOLOGY at 655; Kaplan, *The Exclusionary Rule*, *supra*, 26 STAN. L. REV. at 1045; Mertens & Wasserstrom, *supra*, 70 GEO. L.J. at 447. *See also Franks v. Delaware*, 438 U.S. at 168.

[65]In a similar context, Justice Harlan forecast that police who denied third-degree tactics would "lie as skillfully about warnings and waivers." *Miranda v. Arizona*, 384 U.S. 436, 505 (1966) (Harlan, J., dissenting).

[66]*See, e.g.*, cases cited *supra* p. 28.

[67]*See, e.g.*, cases cited *supra* note 6.

search. *Id.* at 88. Though unsupported by probable cause or articulable suspicion that the patrons were armed, the pat-down was specifically authorized by statute. *Id.* at 87 & n.1. Despite the officer's clearly "reasonable" reliance on the statute, the Court held the pat-down search unconstitutional, noting that it has always unhesitatingly held statutes purporting to authorize searches without probable cause to be "invalid as authority for unconstitutional searches." *Id.* at 96 n.11 (citing *Torres v. Puerto Rico*, 442 U.S. 465 (1979); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *Sibron v. New York*, 392 U.S. 40 (1968); *Berger v. New York*, 388 U.S. 41 (1967)). Under a reasonable good faith exception, *Ybarra* would be decided wrongly, and this line of cases would be effectively overruled.

In *United States v. Johnson*, 457 U.S. 537 (1982) the Court retroactively applied the rule of *Payton v. New York*, 445 U.S. 573 (1980), that police must obtain a warrant before forcibly entering a suspect's home to make an arrest. *Id.* at 562. The government argued that the police had not violated any pre-existing, clearly articulated guidelines from past cases. The Court rejected this argment on the ground that it would reduce the retroactivity doctrine regarding new rulings "to an absurdity," *id.* at 560:

> Under this view, the only Fourth Amendment rulings worthy of retroactive application are those in which the arresting officers violated pre-existing guidelines clearly established by prior cases. But as we have seen above, cases involving simple application of clear, preexisting Fourth Amendment guidelines raise no real questions of retroactivity at all. *Literally read, the Government's theory would automatically eliminate all Fourth Amendment rulings from consideration for retroactive application.*

Id. (emphasis added.) Application of a reasonable good faith rationale would accomplish precisely that — *no* Fourth Amendment ruling would be entitled to retroactive effect, *Johnson* would be overruled, and the entire law of retroactivity in the Fourth Amendment context would be changed.

Further examples of established Fourth Amendment precedent which would be undermined or overruled are virtually endless. If, for example, an officer reasonably relied on a warrant which was the unattenuated fruit of a prior illegal search, the doctrine of *Wong-Sun v. United States*, 371 U.S. 471, 484 (1963) would be substantially altered. *Cf. United States v. Grunsfeld*, 558 F.2d 1231, 1240 (6th Cir.), *cert. denied*, 434 U.S. 872, 1016 (1977) (warrant cannot be validly supported by evidence obtained in prior illegal search). An exception for good faith reasonable

reliance on a warrant would undermine cases holding that potential problems of the neutrality and detachment of a magistrate invalidate the warrant. *Cf. Connally v. Georgia*, 429 U.S. at 250; *Coolidge v. New Hampshire*, 403 U.S. at 449-53.[68] The good faith reliance rationale would similarly extend to and undermine the requirement of probable cause for electronic surveillance of private conversations. *Berger v. New York*, 388 U.S. 41 (1967). The rationale would also apply to precedent regarding administrative searches. *See, e.g., Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (OSHA searches of employment facilities); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (administrative search of retail business). Clearly, disruption of seventy years of orderly precedent is a high price to pay for the resulting decrease in the amount of evidence suppressed from the government's case-in-chief at trial.

7. A Reasonable Good Faith Exception Would Leave No Alternative Remedy for Acknowledged Violations of the Fourth Amendment.

In the forty-eight years between *Weeks* and *Mapp*, states were free to devise an adequate disincentive to Fourth Amendment violations, but were unable to do so. As a result, the exclusionary rule is essential to keep the right of privacy secured by the Fourth Amendment from "remain[ing] an empty promise." *Mapp v. Ohio*, 367 U.S. 643, 660 (1961). No new remedies have appeared since *Mapp*. As observed by retired Justice Stewart, a number of alternative remedies exist in theory, but:

> [R]eality did not conform to theory. "Alternatives are deceptive. Their very statement conveys the impression that one possibility is as effective as the next. In this case their statement is blinding. For there is but one alternative to the rule of exclusion. That is no sanction at all."[69]

Civil liability for damages has long been rejected as an adequate deterrent. As pointed out by Justice Murphy thirty-five years ago, the disadvantages of a tort remedy include the difficulty in obtaining punitive damages, variations in state rules limiting damages, and "judgment-proof" officers. *Wolf v. Colorado*, 338 U.S. 25, 43-44 (1949) (Murphy, J., dissenting). Additional problems include the fear of reprisals from police, and the likelihood of jury prejudice in favor of officers. *See* Mertens &

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[68]Petitioner apparently concedes that this line of cases would be overruled by the good faith exception. *See* P. Br. at 62.

[69]Stewart, *supra*, 83 COLUM. L. REV. at 1378-79 (quoting *Wolf v. Colorado*, 338 U.S. 25, 41 (1949) (Murphy, J., dissenting)) (footnote omitted).

Wasserstrom, *supra*, 70 GEO. L.J. at 407. Generally, it is extremely difficult for the victim of an illegal search to finance or find a competent attorney to finance this type of litigation. *See* Stewart, *supra*, 83 COLUM. L. REV. at 1388. The magistrate who issues an unconstitutional warrant is immune from suit, *Stump v. Sparkman*, 435 U.S. 349, 363 n.12 (1978); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 810-11 (1982). Where the reasonable, good faith exception applies, it follows by definition that police officers would also have a good faith defense to civil liability for their misconduct, particularly where a search warrant is involved. *See United States v. Ross*, 456 U.S. 798, 823 n.32 (1982). Similarly, injunctive relief would be unavailable. *Rizzo v. Goode*, 423 U.S. 362 (1976). A municipality would also be immune from suit unless the officer was implementing an official governmental policy by his unconstitutional conduct. *Monnell v. Department of Social Services*, 436 U.S. 658, 691 (1978).

Civil litigation for damages or injunctive relief is a notoriously slow process which regularly drags on for years. Any alternative remedy must be swift if it is to act as a meaningful disincentive to improper police conduct.

Internal administrative discipline would also fail to prevent searches under warrants without probable cause. It is unrealistic to expect police departments to require a cross-check for the validity of every warrant obtained, or to order officers not to execute warrants which appear questionable. It is doubtful that law enforcement would seriously consider disciplining an officer who had been found to have "reasonably relied" on an unconstitutional warrant. It ignores the realities of the criminal justice system to believe that police will be criminally prosecuted for intentionally conducting unlawful searches and seizures.

To the extent any alternative remedy is available, it would only be invoked in cases of the most egregious misconduct which have generated significant publicity.[70] Yet the exclusionary rule would presumably be left intact as a deterrent to such misconduct under a good faith exception. The misconduct to which it would not apply is the same misconduct that would

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[70]It is the routine violations of the Fourth Amendment, rather than shockingly egregious incidents, which most require the exclusionary sanction. Shocking or violent intrusions can perhaps be curtailed by civil or criminal actions against the offending party, but prevention of the less egregious violations must depend on exclusion of the evidence thus obtained. *See* Kamisar, *A Defense of the Exclusionary Rule*, 15 CRIM. L. BULL. 5, 32-34 (1979).

be unremedied by alternative sanctions.[71]

If civil or administrative remedies were available, they would function more as personal sanctions instead of systemic disincentives against illegal activity. This personal liability, whether in damages or professional reproval, would certainly intimidate police from legal conduct within constitutional bounds to a far greater extent than the threat of suppressed evidence.

Even if alternative remedies were available, it is unclear who would pursue them and to what end. Litigants would likely find little incentive for pursuing other remedies. A criminal defendant generally has limited resources, and more immediate concerns than litigation of collateral issues.

Petitioner acknowledges by implication that no meaningful alternatives to the exclusionary rule exist, and suggests that development of alternative remedies has been inhibited by the continued existence of the rule. [P. Br. at 87] This position appears disingenuous in light of the Justice Department's support of pending legislation which would allow absolute civil immunity for law enforcement employees who violate the Fourth Amendment.[72]

The proposed legislation would eliminate individual liability by substituting a right of action directly against the federal government with damages limited to one or two thousand dollars.[73] However, the government would be allowed to assert the good faith of the offending officer as a complete defense, eliminating *any* remedy for victims of illegal acts to which the proposed good faith exception to the exclusionary rule would apply.[74] Moreover, if the victim were convicted in the criminal case, the civil recovery, if any, would be limited to actual damages. Unless the illegal search involved physical violence or the destruction of property,

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[71]If draconian civil remedies could effectively stop police misconduct, it is noteworthy that their "cost," in terms of lost evidence, would ideally be the same or greater than that of the exclusionary rule.

[72]*See, e.g.*, S. 283 and S. 829, 98th Cong., 1st Sess. (1983); H.R. 3142, 98th Cong., 1st Sess. (1983); S. 1775, 97th Cong., 1st Sess. (1982).

[73]*See, e.g.*, S. 829, *supra* (limits liquidated damages to $1,000.00 or actual damages, which normally would be insignificant, and precludes punitive damages); H.R. 3142, *supra* (limits liquidated damages to $2,000.00 or amount of actual damages and precludes punitive damages).

[74]*See, e.g.*, S. 1775, 97th Cong., 1st Sess. (1982) (proposed amendment to 28 U.S.C. § 2672(d)(1)).

the victim of the violation would recover nothing.[75]

In light of the Justice Department's consistent support of these limitations on the availability of alternative remedies, it is understandable that Petitioner asserts that the absence of alternative remedies is "simply not a controlling consideration." In fact, in the absence of any meaningful alternatives to discourage Fourth Amendment violations, the proposed good faith exception would turn the Warrant Clause into a mere abstract ideal, and return the protections of the Fourth Amendment to an empty promise.

II.

IN THEORY, THE EVIDENCE SAVED FROM EXCLUSION BY THE REASONABLE GOOD FAITH EXCEPTION, IN THE CONTEXT OF THIS CASE, IS THAT SEIZED IN "REASONABLE" RELIANCE UPON A SEARCH WARRANT ISSUED WITHOUT ANY SUBSTANTIAL BASIS FOR PROBABLE CAUSE.

A. The Fourth Amendment Presumes That Evidence to Be "Saved" Would Be Unavailable.

While the probable cause requirement impedes the gathering of evidence and apprehension of suspected criminals, it embodies a trade-off for the competing value of privacy protected by the Fourth Amendment.[76] Each piece of evidence which is suppressed because it was seized in violation of the Fourth Amendment is evidence which the nation's founders determined should never have been seized by the government. Whatever evidence is lost by suppression (i.e., the "cost" of the exclusionary rule), and would presumably be saved by the proposed exception, is evidence that would not have been available if the government had complied with

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[75]*See, e.g.*, S. 283, 98th Cong., 1st Sess. (1983); S. 751, 97th Cong., 1st Sess. (1981). Retired Justice Stewart has expressed "serious misgivings about such a limitation and question[s] whether these proposals could constitutionally supplant the exclusionary rule," since "the victim will have no incentive to bring suit and therefore no opportunity for a judicial determination of whether the fourth amendment has been violated." Stewart, *supra*, 83 COLUM. L. REV. at 1398.

[76]*See* Mertens & Wasserstrom, *supra*, 70 GEO. L.J. at 390.

the law.[77] As Professor LaFave has aptly explained:

> Those who drafted the Fourth Amendment may not have specifically contemplated the exclusionary sanction, but surely they expected the commands of the Amendment to be adhered to. "To the extent that the police obey the constitutional commands, the community foregoes such advantages as it might enjoy from evidence that can only be obtained illegally." It may fairly be said, then, as Justice Traynor once observed, that the cost argument was rejected when the Fourth Amendment was adopted.

1 W. LAFAVE, SEARCH AND SEIZURE, § 1.2, at 23 (1978) (footnotes omitted).[78]

To the extent a reasonable, good faith exception would reduce the "cost" of the exclusionary rule and "save" otherwise unavailable evidence, the "saved" evidence is presumed to be unavailable because of compliance with the Fourth Amendment, and is only available by its violation.

B. The Exclusionary Rule Actually Results in the Loss of Few Convictions.

The "cost" of the exclusionary rule, measured in evidence suppressed and the inability to convict certain guilty defendants, has been substantially exaggerated. This is somewhat understandable, because the public can see evidence that is illegally seized and suppressed, yet is never aware of

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[77]As observed by Professor Kamisar, "It is not that [the criminal] is going free because the constable has blundered. It is because he would have gone free if the constable had complied with the law. It seems to me that if you put it that way, it comes out differently." *Exclusionary Rule Bills: Hearing Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary on S. 101, S. 751 and S. 1995*, 97th Cong., 1st and 2d Sess., at 866 (1982) [hereinafter cited as *Exclusionary Rule Hearings*].

[78]*See, e.g., Mincey v. Arizona*, 437 U.S. 385, 393 (1978) ("the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law"); *United States v. Rabinowitz*, 339 U.S. 56, 67-68 (1950) (Black, J., dissenting) ("The framers of the Fourth Amendment must have concluded that reasonably strict search and seizure requirements were not too costly a price to pay . . .").

illegal police activities that are deterred by the rule,[79] nor of undeterred police abuses which never come to the attention of the court.[80]

The availability of illegally seized evidence for use in court proceedings has been significantly increased in recent years as a result of the extensive limitations the Court has placed on the scope of the exclusionary rule. Perhaps the most sweeping limitation pertains to standing, making the exclusion remedy available only to one whose reasonable expectation of privacy was invaded by the illegal government conduct. *Rawlings v. Kentucky*, 448 U.S. 98 (1980).

The dramatic effect that the standing limitation has on the incidence of evidence suppressions is demonstrated by the limited scope of the district court's suppression orders in this case. While Respondent Leon had standing to suppress items found in his home, that evidence is admissible against Respondents Sanchez, Stewart and Del Castillo. Moreover, under

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[79]*See* Mertens & Wasserstrom, *supra*, 70 GEO. L.J. at 394:

> Despite the similarities between the probable cause requirement and the exclusionary rule, the disparate amount of public attention that their effects receive constitutes one important difference. The costs of the exclusionary rule are immediately apparent; its benefits are only conjectural. When courts apply the rule, they deprive law enforcement officers of incriminating evidence. In contrast, any police misconduct that would have occurred but for the deterrent effect of the suppression order is purely speculative. On the other hand, when the police do not search because they believe they lack probable cause, the public is not aware that potential evidence is lost. Further, in the unlikely event that the public becomes aware of a decision not to search, the benefits are apparent. An individual's privacy remains intact while the cost is merely conjectural; it cannot be known if evidence was in fact lost. Thus, although the cost of adhering to the requirements of the fourth amendment and the cost of applying the exclusionary rule are similar, the exclusionary rule "rubs our noses in it."

(Footnote omitted.)

[80]Justice Jackson stressed the breadth of police illegality in his dissenting opinion in *Brinegar v. United States*, 338 U.S. 160, 181 (1948), cited with approval in *Elkins v. United States*, 364 U.S. 206, 217-18 (1960):

> Only occasional and more flagrant abuses come to the attention of the courts . . . There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.

the district court's order, evidence seized from 620 Price Drive,[81] 7902 Via Magdelena,[82] and of Stewart and Del Castillo's automobiles[83] is also admissible against Leon.[84]

Limitations on the scope of the exclusionary rule also render illegally seized evidence available for use in a wide range of other contexts, from use in collateral proceedings to impeachment at trial. Application of the exclusionary rule is also already tempered by an objective reasonableness standard. The probable cause standard does not require certainty. The Fourth Amendment only requires a reasonable probability that the items to be seized will be found in the place to be searched.[85]

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[81]Evidence seized from this location and admissible against Respondent Leon includes letters to both Leon and Sanchez, receipts for weapons belonging to Leon and Sanchez, letters for Leon addressed to Sanchez, purchase papers for a Miami condominium in the names of Leon, Sanchez and Stewart, and various diaries and address books, as well as about an ounce of cocaine. This evidence and the contents of a safe deposit box discovered as a result of this search, were not suppressed as to Leon or Del Castillo. [J.A. 127-28]

[82]The district court found that none of the Respondents had a sufficient expectation of privacy to suppress evidence seized from the alleged "stash pad" at 7902 Via Magdelena. [J.A. 128] This evidence includes scales and cocaine paraphernalia, the vast majority of the drugs seized in this case, and various documents including a receipt for Leon's shotgun. [J.A. 62-68]

[83]Evidence seized from the automobiles is similarly admissible against Leon; only the automobile owner had standing to suppress evidence seized from any given automobile. [J.A. 129]

[84]The suppression of evidence in this case typifies the exaggerated perception of the exclusionary rule's "cost." The suppression of pounds of drugs and numerous incriminating documents seems extreme at first glance. Yet because of standing considerations, the district court's suppression order was actually quite limited. In summary, evidence from Leon's home was not suppressed as to Sanchez, Stewart or Del Castillo. Evidence from 620 Price Drive was not suppressed as to Leon or Del Castillo; evidence from Stewart's car was not suppressed as to Leon, Sanchez or Del Castillo; evidence from Del Castillo's car was not suppressed as to Leon, Sanchez or Stewart, and evidence from 7902 Via Magdelena — including the bulk of contraband seized in this case — was not suppressed as to any defendant.

[85]The determination of probability may be based upon rumors, hearsay, a suspect's prior record or other evidence inadmissible at trial. *See, e.g., United*

(footnote continued on following page)

The scope of the exclusionary rule's application is also narrowly defined by the facts of a given search. For example, where evidence outside the authorized scope of a search warrant is seized, federal appellate courts have uniformly suppressed only the illegally seized evidence, while admitting evidence seized pursuant to the terms of the warrant. *See, e.g., United States v. Dunloy*, 584 F.2d 6, 11 n.4 (2d Cir. 1978); *see also Andreson v. Maryland*, 427 U.S. 463 (1976). Increasingly, as an alternative to total suppression, courts have engaged in redaction of overbroad search warrants to preserve the admissibility of items seized pursuant to portions of the warrant supported by adequate probable cause or described with sufficient particularity. *E.g., United States v. Christine*, 687 F.2d 749, 759 (3d Cir. 1982).

The expanding limitations on the scope of the exclusionary rule, and the nature of those limitations, strongly indicate that the cost of the rule is far less than Petitioner asserts. This conclusion is uniformly supported by the available empirical analysis of the rule's application.

According to a Government Accounting Office study of 2,804 cases handled in 38 U.S. Attorney's offices in 1978, search and seizure problems

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States v. Ventresca, 380 U.S. 102, 107-09 (1965); *Aguilar v. Texas*, 378 U.S. 108, 114 (1964); *Draper v. United States*, 358 U.S. 307, 311-13 (1959). The exclusionary rule has also been held inapplicable where a policeman makes a reasonable factual mistake. *See* Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1044 (1974). *See, e.g., United States v. Robinson*, 414 U.S. 218 (1973) (hard object seized during traffic arrest and subsequent search for weapons held admissible, although actually a cigarette package containing heroin); *Hill v. California*, 401 U.S. 797, 803-04 (1971) (evidence from arrest based on probable cause admissible despite the fact that police arrested the wrong person due to a misidentification). The holding in *Hill*, based upon the "touchstone of reasonableness" under the Fourth Amendment, must not be confused with the good faith exception proposed by Petitioner. In *Hill* (as opposed to the instant case), the officers did have probable cause for an arrest. The Court specifically declined the opportunity to extend its rationale to that advanced by the Petitioner here:

> [The police] were quite wrong as it turned out, and subjective good-faith belief would not in itself justify either the arrest or the subsequent search. But sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time.

Hill v. California, 401 U.S. at 804.

accounted for only 0.4% of the arrests declined for prosecution by United States Attorneys, and evidence was suppressed in only 1.3% of the cases actually filed, half of which still resulted in convictions. COMP. GEN. REP. NO. GGD-79-45, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL PROSECUTORS 11, 13, 14 (1979) [hereinafter cited as GAO REPORT].[86] A recent commentary indicates that these figures, *combined*, amount to a loss of only 0.8% of all federal felony arrests.[87] Petitioner cites a 1982 study by the National Institute of Justice[88] that found that 4.8% of California criminal cases declined for prosecution were rejected because of search and seizure problems. NATIONAL INSTITUTE OF JUSTICE, THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA 1 (1982) [hereinafter cited as NIJ STUDY].[89] But the 4.8% figure is a percentage of *declined* arrests only, which is not a useful measurement.

A more valid measure of the exclusionary rule's effect is the percentage of all felony arrests that prosecutors reject because of illegal searches.[90] The data reported in the NIJ study shows California prosecutors rejected only 0.8% of their total cases for search and seizure reasons.[91] Moreover,

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[86]Petitioner criticizes the GAO study for surveying federal prosecutors, most of whose cases, according to Petitioner, do not involve search and seizure issues. [P. Br. at 70 n.34] In fact, depending on the size of the office, between 69 and 88% of the defendants whose cases were accepted for prosecution were accused of crimes, such as firearms, narcotics, and immigration violations, that are "most susceptible" to search and seizure challenges. GAO REPORT, *supra*, at 7.

[87]Davies, *What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: A Hard Look at the NIJ Study and a Review of Other Research*, 1983 AM. B. FOUND. RESEARCH J. (No. 3, forthcoming) [hereinafter cited as Davies, "*Costs*"].

[88]The National Institute of Justice [hereinafter cited as NIJ] is the research arm of the United States Department of Justice.

[89]The study's findings may have been rendered obsolete by California's recent abolition of independent state grounds for the exclusion of unconstitutionally obtained evidence. *See* CAL. CONST. art. I, § 28(d) (added by Initiative Measure, approved by the people, June 8, 1982).

[90]This measure isolates the effect of the exclusionary rule itself and is not affected by the importance of other factors, such as witness non-cooperation or lack of evidence, the principal reasons for non-prosecution.

[91]Presented by police with 520,993 felony cases, prosecutors rejected 86,033 (16.5%), 4,130 of which (0.8% of the total arrests) were rejected for search and seizure reasons. The NIJ, which had the raw data available, NIJ STUDY, *supra*, at 10, omitted calculation of these percentages.

this figure is significantly higher than the national average, because at the time of the study California recognized a broad vicarious standing rule that enabled defendants not personally victimized by an illegal search or seizure to gain the benefit of exclusion. *Kaplan v. Superior Court*, 6 Cal. 3d 150, 161, 98 Cal. Rptr. 649, 656, 491 P.2d 1, 8 (1971). Additionally, at the time California protected a broader spectrum of privacy rights on independent state constitutional grounds. *See, e.g., People v. Krivda*, 8 Cal. 3d 623, 624, 105 Cal. Rptr. 521, 521, 504 P. 2d 457, 457 (1973) (search of trash cans protected by state constitution). The GAO study reports that 0.4% of rejected arrests were refused by prosecutors primarily because of illegal searches. GAO REPORT, *supra*, at 14. Since prosecutors refused 46% of all arrests, this means that federal prosecutors rejected 0.2% (i.e., 0.4% of 46%) of all arrests because of search and seizure problems. *See* Davies, "*Costs*," *supra*. The percentage is probably significantly lower today because of recent decisions of the Court such as the imposition of more rigorous standing requirements. By either measure, the percentage of cases not prosecuted because of search and seizure problems is not significant.

Having failed to establish that the exclusionary rule has any substantial overall effect on failures to prosecute arrests generally, Petitioner claims that California prosecutors rejected 30% of all felony drug arrests because of search and seizure problems. [P. Br. at 70] This was based on samples of only a few hundred cases from two of 21 Los Angeles County prosecutor's offices with atypically high search-rejection rates and is totally unrepresentative of the state as a whole.[92] The statewide figure, according to the statewide data source used by NIJ, is less than *three* percent. *See* Davies, "*Costs*", *supra*. For example, data from the Bureau of California Criminal Statistics for 1980 shows that only 938 of 40,451 drug arrests, or 2.3%, were rejected because of illegal searches. Davies, *Do Criminal Due Process Principles Make a Difference?*, 1982 AM. B. FOUND. RESEARCH J. 247, 265.

While the impact of the exclusionary rule on the successful prosecution of drug cases is small, its role in cases involving violent crimes is virtually non-existent. Although the NIJ study does not report the percentages of violent crime arrests rejected because of illegal searches, it does show very small numbers of such rejections. NIJ STUDY, *supra*, at 12, Table

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[92]*See* Davies, "*Costs*," *supra*. *See also* Remarks of Hon. Shirley M. Hufstedler at American Bar Association Annual Meeting, reported at 33 CRIM. L. REP. (BNA) 2411 (August 17, 1983).

3. Using the same California source, it has been shown that prosecutors reject only 0.25% (less than 3 in 1000) of all non-drug arrests and even lower rates for violent crime arrests (e.g., only 0.06% or 6 in 10,000 homicide arrests). *See* Davies, "*Costs*," *supra*. A study of Washington, D.C., arrests conducted in 1974 by the Institute for Law and Social Research showed that of the over 5,000 persons charged with violent crimes, *no one* was released by the prosecution because of search and seizure problems.[93] According to 1980 data from the California Bureau of Criminal Statistics, in only about 0.1% of cases involving violent crimes were charges dropped for Fourth Amendment reasons. Davies, *Do Criminal Due Process Principles Make a Difference?*, *supra*, 1982 AM. B. FOUND. RESEARCH J. at 265.

As would be expected, when evidence is excluded, there appears to be some impact on convictions. Petitioner points to data indicating that conviction rates dropped from 84% in cases in which a suppression motion had been denied to 50% in cases in which a motion had been granted in whole or in part. [P. Br. at 71 & n.35][94] These statistics are meaningless. The 50% figure is based upon a total sample of only 41 cases in which suppression motions were granted in whole or in part; only 19 of those cases resulted in dismissals or acquittals. The sample is too small to be statistically significant. This does show, however, that the suppression of evidence certainly does not mean that an accused will go free. To the contrary, more often than not a defendant who successfully had evidence suppressed was nevertheless convicted.

In fact, evidence is very rarely suppressed in court at all. Suppression motions were only filed in 10.5% of all federal criminal cases surveyed. GAO REPORT, *supra*, at 8. Of the motions filed, between 80 and 90% were denied. *Id.* at 10. Evidence was actually excluded in only 1.3% of the 2,804 cases studied; only 0.7% of the cases resulted in acquittal or dismissal after evidence was excluded. *Id.* at 9-11. A recent study of 7,500 felony prosecutions in Pennsylvania, Michigan, and Illinois found

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[93]Canon, *Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for its Retention*, 23 S. TEX. L. REV. 559, 576 (1982).

[94]It is unclear, however, how much of this difference is due to the exclusion of evidence and how much is due to other factors. The authors of the study admit as much. GAO REPORT, *supra*, at 13. Indeed, it is quite likely that counsel who managed to prevail against heavy odds on suppression motions are more energetic, competent, and successful than those who do not.

that suppression motions were filed in only 5% of the cases, and granted in only 0.7%. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RESEARCH J. (No. 3, forthcoming).

Petitioner also claims that the exclusionary rule tends in practice to "free the recidivist." [P. Br. at 71 n.36] Petitioner again relies on the conclusions of the NIJ study that "[f]or most defendants, the arrest that ended in release because of the exclusionary rule was only a single incident in a larger criminal career." *Id.* In fact, the statewide data reported by NIJ shows that perhaps as few as a quarter of all released arrestees had subsequent felony records. Even fewer had subsequent convictions, a better indicator of recidivism that NIJ failed to use because of shortcomings in its data. NIJ STUDY, *supra*, at 8.

It is impossible to determine from the NIJ statistics whether, as Petitioner seems to claim, the exclusionary rule disproportionately favors "recidivists." The study included no comparative data on re-arrest rates for those with past involvement in the criminal justice system generally. The NIJ data do show that fewer than 7% of rearrests of released defendants are for crimes against persons.

Petitioner also complains of the burden that the exclusionary rule places on the judicial system. [P. Br. at 74-75] In fact, the resources are modest when compared with the total amount of the resources used in the criminal justice system. The GAO study found that only 1.3% of available United States attorney's offices' time devoted to case prosecution was devoted to Fourth Amendment motions. GAO REPORT, *supra*, at 12.

Moreover, there is no indication that providing a good faith exception to the exclusionary rule will result in less judicial time being devoted to Fourth Amendment questions. On the contrary, adoption of a good faith exception, rather than simplifying Fourth Amendment law, is more likely to result in more complex and time-consuming evidentiary hearings. *See supra* discussion at 30-37. Equally important, given the low success rate of suppression motions currently filed, it is unlikely that the adoption of a good faith exception would have much impact on the number of motions filed. Indeed, it appears that a substantial proportion of illegal searches, especially in drug arrests, are so blatantly illegal that they would not be covered by the proposed exception. *See* Davies, "*Costs*," *supra*.

Finally, Petitioner asserts that the exclusionary rule "exacts an exceedingly high societal cost by lessening" public respect for the judicial system. [P. Br. at 71] The judiciary obviously should not be a barometer of public opinion. On the contrary, the exclusionary rule is a strong symbol

of the judiciary's unwillingness to encourage official lawlessness by allowing the use of illegally seized evidence.[95]

What does potentially lessen public respect for the judicial system is the systematic fanning of public sentiment by dissemination of misleading claims about the exclusionary rule's effect similar to those advanced by Petitioner. Compared to the immeasurable number of illegal searches and seizures deterred by the exclusionary rule, the number of prosecutions dropped or lost, the amount of judicial resources consumed in litigating suppression motions and the other alleged "costs" of the Fourth Amendment are not substantial.

C. The Vast Preponderance of Evidence Seized Pursuant to Search Warrants Is Not Excluded.

The "cost" of the exclusionary rule, in terms of suppressed evidence, is less significant in the context of seizures pursuant to search warrants. A recent study of the warrant process in seven cities across the country, involving over 900 search warrants issued from January through June of 1980, found only 17 cases where motions to suppress were granted. VAN DUIZEND, THE SEARCH WARRANT PROCESS, *supra*, at 1-4, 2-41 (Table 2-23). The study also found that motions to suppress were filed in an average of only 38.6% of cases involving a search warrant and:

> In few instances were these motions heard,[96] much less granted, and we were able to discover only one instance in which a case was

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[95]As retired Justice Stewart recently wrote:

> In some circles, the exclusionary rule has been accepted, however grudgingly, as the embodiment of our nation's commitment to ensuring that the fourth amendment's restraints on the power of government are zealously observed. Indeed, to some less-informed observers of the criminal justice system, it has replaced the fourth amendment itself as the source of prohibition against illegal behavior by law enforcement officials. Thus, when the effectiveness of alternative remedies is considered, we must bear in mind that the exclusionary rule is now part of our legal culture. Realistic appraisals of the effectiveness of the rule must, therefore, take into account the inevitable misperceptions that will arise in the minds of many that "repealing the rule" would signal a weakening of our resolve to enforce the dictates of the fourth amendment.

Stewart, *supra*, 83 COLUM. L. REV. at 1386.

[96]This was apparently largely because many cases resulted in a guilty plea before the motion was heard. VAN DUIZEND, THE SEARCH WARRANT PROCESS, *supra*, at 4-9. In one city studied, a motion was considered "filed" simply by checking a box on an omnibus hearing form; in many instances, these "motions" were never heard. *Id.* at 2-40.

> dismissed after a case in which a motion to suppress regarding a warrant was granted. Twelve of the seventeen cases in which a motion to suppress was granted nevertheless resulted in a conviction.

Id. at 4-8. Many police officers who were most involved in the warrant process said "they could not remember the last time they or a close associate were involved in a case in which a motion to suppress was granted or a prosecution dismissed because of a faulty warrant." *Id.* at 8-11.

This Court has not suppressed evidence obtained under an erroneously issued warrant for over fourteen years, since *Spinelli v. United States*, 393 U.S. 410 (1969). A survey of decisions of the District of Columbia Court of Appeals and the U.S. Court of Appeals for the District of Columbia found no recent cases holding a warrant insufficient other than those involving a knowing or reckless misstatement of material fact by the affiant.[97] Yet the rare case of evidence seized pursuant to a warrant unsupported by any substantial basis for a finding of probable cause, is the only occasion where the sweeping modification proposed for the exclusionary rule in this case would make any otherwise excluded evidence available for use in the government's case-in-chief.

The standards used by reviewing courts also compel the conclusion that little evidence seized under warrant is suppressed. The reviewing court does not substitute its judgment for that of the magistrate; it merely considers whether the initial judgment was reasonable and major deference is accorded the magistrate's initial determination of probable cause. In a marginal case, a search under a warrant may be sustainable when a warrantless search would be invalid, *United States v. Ventresca*, 380 U.S. 102, 106-08 (1965). This policy was strongly reiterated in *Illinois v. Gates*, 103 S. Ct. at 2331-32, where the Court stated a magistrate's finding must be upheld if, based upon the "totality of the circumstances," there is a "substantial basis" for a "fair probability" that the items to be seized will be found in a particular place.

A primary incentive for police and prosecutors to obtain a search warrant is to assure that the seized evidence will be admissible at trial. It follows that prosecutors will reject very few cases due to search and seizure problems where warrants were used. Hearings on motions to suppress involve limited, if any, testimony where a warrant was used; normally the motion is determined on the face of the warrant and supporting af-

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[97]Mertens & Wasserstrom, *supra*, 70 GEO. L.J. at 456.

fidavit.[98] Given the applicable standards of review and benefit of the doubt in marginal cases, findings that a warrant was issued without any substantial basis for probable cause in the totality of circumstances will be rare. Even in the few cases of an unsustainable warrant, doctrines of standing and redaction severely limit the potential that evidence will be suppressed.

D. The Proposed Exception Will Not "Save" a Significant Amount of Presently Excluded Evidence.

The purported "objective test" of reasonable good faith reliance on a search warrant would, at first glance, appear to operate as a blanket rule that absent evidence of bad faith, evidence seized pursuant to a search warrant is admissible. The standards for review of probable cause, together with present limits on the applicability of the exclusionary rule, indicate that most evidence seized under warrant is already admissible in the government's case-in-chief, as well as in the numerous contexts in which the rule is not applied. Obviously, the proposed reasonable good faith exception to the rule does nothing to "save" the admissibility of that evidence.

Presumably, the exception would not reach warrants obtained in bad faith such as fraud[99] or pretext.[100] It appears that proponents of the exception would also not extend the exception to merely conclusory affidavits such as those condemned in *Nathanson v. United States*, 290 U.S. 41, 46-47 (1933) and *Aguilar v. Texas*, 378 U.S. 108, 112-15 (1964),[101] or cases

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[98]As explained *supra* pp. 30-37 the relative simplicity of suppression hearings regarding warrants would be transformed into a complex multi-layered inquiry of the officer's belief, training, and applicable standards for reasonable reliance under the exception proposed by Petitioner.

[99]E.g., where the affiant intentionally or recklessly misleads the magistrate regarding material facts necessary to a finding of probable cause. *See, e.g., Franks v. Delaware*, 438 U.S. 154, 155-56 (1978).

[100]E.g., where officers obtain a warrant as a pretext to justify a search for other purposes. *See, e.g., United States v. Rettig*, 589 F.2d 418, 420-22 (9th Cir. 1978) (after a warrant request was denied by one magistrate, officers obtained warrant from a second magistrate for purported purpose of searching for marijuana; in fact, officers intended to use warrant in conducting investigation of a cocaine smuggling operation for which they had no probable cause).

[101]P. Br. at 65-66. *See also* Justice White's dissenting opinion in *Illinois v. Gates*, 103 S. Ct. at 2345.

"so clearly lacking in probable cause that no well-trained officer could reasonably have thought that a warrant should issue."[102] As a result, the proposed "reasonable good faith" exception would save from exclusion, evidence seized under a warrant which lacked any substantial basis for a finding of probable cause, other than warrants issued or obtained in bad faith or warrants below an undefined — and undefinable — threshold of factual support. The only warrants lacking any substantial basis for probable cause are those based entirely on conclusory allegations, such as in *Nathanson* or *Aguilar*, or those that cross the limits beyond which a magistrate may not venture in issuing a warrant. Sustaining such warrants would require the Court to overrule *Illinois v. Gates*.[103]

Under this analysis, the items seized from Petitioner Leon's house would still be excluded from evidence.[104] Yet short of wholly speculative or conclusory affidavits, the proposed "reasonable good faith reliance" test would apply only to a difficult-to-define category of warrants "reasonably" relied upon despite the absence of any reasonable basis for a finding of probable cause. The primary theoretical "benefit" of the proposed exception to the exclusionary rule — i.e., use of the fruits of a "reasonably unreasonable" search warrant — is certainly insignificant, particularly when measured against the undesirable ramifications of the proposal.

III.

A REASONABLE, GOOD FAITH EXCEPTION WOULD SUBSTANTIVELY DILUTE FOURTH AMENDMENT PROTECTIONS AND RENDER THE WARRANT CLAUSE MEANINGLESS.

The exclusionary rule exception for reasonable good faith reliance upon a search warrant focuses on the belief of the officer executing the warrant, as opposed to the issuing magistrate. As a result, the operative determination on which a search is or is not invalidated will no longer be the requirement of probable cause; instead the issue turns upon what the officer reasonably believed. Professor LaFave recently observed that

> it is nothing short of nonsense to talk of a reasonable belief that there is probable cause, for the probable cause standard itself takes into account reasonable mistakes of fact. If mistakes of law were

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[102]*Illinois v. Gates*, 103 S. Ct. at 2346 (White, J., dissenting).

[103]The *Gates* majority specifically reaffirmed its rejection of conclusory affidavits exemplified in *Nathanson* and *Aguilar*. *Gates*, 103 S. Ct. at 2332.

[104]*See infra* discussion at 70-73.

> also to be taken into account, then the law becomes whatever the officer thinks it is.[105]

Petitioner no doubt argues that this is not a problem, because the law would merely be what the officer *reasonably* thinks it is. But that is precisely the problem. Warrants will no longer require even a substantial basis for probable cause; all that would be required is a "reasonable belief" that there must be some basis for a finding of probable cause, or what Professor Kamisar has aptly described as a "double dilution" of the probable cause standard.[106] In effect, reviewing courts would be sanctioning a "reasonably unreasonable" search based on the unprecedented and dangerous proposition that a reasonably well-trained police officer is not expected to obey the Fourth Amendment.[107]

After *Gates*, magistrates need only find a substantial basis for a fair probability under the totality of the circumstances that items to be seized will be found in the place to be searched. This is, of course, a standard for review of the magistrate's decision. However, in practice this standard becomes that used by the magistrate in approving a warrant application. Once insulated from judicial review because of the reasonable reliance exception, the operative standard for issuance of a warrant will sink even below the "substantial basis" test, to whether the warrant would reasonably appear to be proper to a trained officer under prevailing legal standards, to the extent they are "predictably articulated." This transmutes probable cause into whatever will appear reasonable to a police officer.

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[105]LaFave letter, *Exclusionary Rule Hearings*, *supra*, at 793-94. The same reasoning was expressed in *Beck v. Ohio*, 379 U.S. 89, 97 (1964):

> We may assume that the officers acted in good faith in arresting the petitioner. But "good faith on the part of the arresting officer is not enough." *Henry v. United States*, 361 U.S. 98, 102 (1959). If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects," only in the discretion of the police.

[106]Kamisar, Supreme Court Review and Constitutional Law Symposium, *supra*, 52 U.S.L.W. at 2231.

[107]A proper search warrant constitutes judicial authorization for police to conduct a search. A reasonable good faith exception would condone the search despite the finding that proper authorization was lacking. Such an unprecedented decision by this Court would undermine the basic notion of legality, by approving this search without probable cause.

This dilution of the probable cause standard is accelerated by the process of magistrate shopping. By this process, the requirements for a warrant become whatever it takes to get a signature from the most lenient magistrate. With no review of the decision, that standard is certain to fall far below probable cause. *See United States v. Karathanos*, 531 F.2d at 34.

As explained *supra*, pp. 29-30, the proposed exception would also logically allow for "reasonable" mistakes in the particularized description of places to be searched and items to be seized, and for the "reasonable good faith" reliance on warrants issued by magistrates in circumstances potentially undermining their neutrality. The only meaningful protection against these constitutional violations would be the officer's perception of reasonableness under an undefined objective standard.

Replacing the probable cause standard in its practical application with what is reasonable to a well-trained officer, given the facts as he perceived them, ignores the essential role played by the magistrate, i.e., the crucial insertion of a neutral and detached party into the warrant process. As explained in *Gerstein v. Pugh*, 420 U.S. 103 (1975):

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. *Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.*

Id. at 113-14 (quoting *Johnson v. United States*, 333 U.S. 10, 13-14 (1948)) (emphasis added).

The officer's perception of facts can and does differ from that of a detached magistrate. In many invalid warrants, the affidavit states only conclusions regarding an informant's credibility and the reliability of the informant's information. Since the affiant personally came to those conclusions, he will seldom believe the warrant is based on an unreasonable showing of probable cause. No matter how well-trained the officer is, his "reasonable" application of the law to a set of facts will be qualitatively different from a magistrate's determination. This, of course, is the very premise of the Warrant Clause.

It must be remembered that the purpose of the proposed exception is to eliminate the "costs" of the exclusionary rule — i.e., the litigation and occasional loss of evidence resulting from an acknowledged violation of the Warrant Clause. The resulting dilution of standards in executing the warrant requirement amounts to a substantive change in the Warrant

Clause, described by Justice Powell as "the very heart of the Fourth Amendment directive."[108] The Amendment would now read: "No Warrants shall issue except upon a showing of something perceived by a police officer as close to a substantial basis for probable cause, as irrefutably determined, reasonably or unreasonably, by a magistrate, regardless of his or her qualifications, neutrality, or the particularity of the warrant."

IV.

APPLICATION OF THE EXCLUSIONARY RULE TO THE FRUITS OF AN ILLEGAL SEARCH WARRANT, OFFERED AT A FEDERAL TRIAL IN THE GOVERNMENT'S CASE-IN-CHIEF, IS CONSTITUTIONALLY COMPELLED.

A. The Fourth Amendment Is Not Self-Executing and Presumes Enforcement at Trial in Federal Courts.

The Fourth Amendment is not self-executing, in that it merely announces the right of the people to be secure from unreasonable searches and seizures. If its protections are to be enforced, they require a remedy which will guarantee the rights granted by its language. The mere issuance of a warrant is insufficient; the immediate concerns that motivated our founders to adopt the amendment was the use of general writs of assistance issued upon mere suspicion. *Payton v. New York*, 445 U.S. 573, 583 & n.21 (1980).

The obvious remedy, as provided in *Weeks v. United States*, 232 U.S. 383, 398 (1914), is to render an unreasonable federal search a nullity by depriving the government of the primary use of its fruits — presentation of evidence in support of criminal charges in the case-in-chief at trial. This is consistent with the execution of other constitutional protections.[109] While the Fifth Amendment does not mention coerced confessions, such evidence is excluded as a matter of course, even where circumstances show the confession is trustworthy. *See Watts v. Indiana*, 338 U.S. 49, 50 n.2 (1949) and cases cited therein. The Sixth Amendment does not specify any remedy for deprivation of the rights of confrontation or counsel, but convictions obtained through such violations must be reversed.

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[108] *United States v. United States District Court*, 407 U.S. 297, 316 (1972).

[109] "The sanction most frequently imposed in response to a constitutional violation is the sanction of nullification." Kamisar, *The Exclusionary Rule, supra*, 16 CREIGHTON L. REV. at 586 (quoting Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1532 (1972)).

Pointer v. Texas, 380 U.S. 400, 406-08 (1965); *Massiah v. United States*, 377 U.S. 201, 204-05 (1964). By the same token, the exclusionary rule, as applied to the government's case-in-chief in federal court, is essential to give meaningful life to the guarantees of the Fourth Amendment. Stewart, *supra*, 83 COLUM. L. REV. at 1404.

In proposing a good faith exception to the exclusionary rule, Petitioner asks the Court not merely to limit application of the rule, but to abolish it entirely in a set of circumstances involving an acknowledged violation of the Fourth Amendment. To the extent the Warrant Clause remains intact under this exception, *see supra* discussion pp. 29-30, Petitioner would have the Court, for the first time,[110] remove the only meaningful disincentive to its violation from application in any judicial context. In effect, the Fourth Amendment prohibition of warrants without probable cause would be reduced to a mere ideal.

B. A Cost-Benefit Analysis Is Inappropriate Regarding Application of the Exclusionary Rule to Unconstitutionally Seized Evidence Offered as Part of the Federal Government's Case-in-Chief.

Petitioner rests the thrust of its argument on a cost-benefit analysis of application of the exclusionary rule. This approach has gained increasing favor with the Court in recent years when, for example, faced with collateral applications of the rule.

The proposition advocated by Petitioner is a qualitatively different application of the cost-benefit analysis. Here, the government would preclude any application of the rule, strictly upon an economic analysis. This "exception" differs dramatically from other limitations on the exclusionary rule, where peripheral uses of illegal evidence were allowed in reliance upon the central application of the rule to the government's presentation of its prima facie case against the accused. Without the central application under *Weeks*, the logic of cases limiting application of the rule collapses.

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[110]As emphasized by Justice Brennan, in the context of application of the exclusionary rule in federal proceedings on direct review:

> [N]o Justice has intimated that *Weeks* should also be overruled, at least in the absence of suitable and efficacious substitute remedies. . . . [The] test whether evidence should be suppressed in federal court has always been solely whether the Fourth Amendment prohibition against "unreasonable" searches and seizures was violated, nothing more and nothing less.

United States v. Peltier, 422 U.S. 531, 552 nn.10-11 (1975) (Brennan, J., dissenting) (citations omitted).

Petitioner asks the Court not simply to balance a marginal increase in deterrence against costs of the rule, but to condemn any use of the rule in this case because it requires strict compliance with an already flexible standard of probable cause, at a marginal cost to police efficiency. This application of the cost-benefit analysis was resolved and rejected when the Fourth Amendment was adopted, and the appropriate balance was determined to be the probable cause standard.[11]

The cost-benefit analysis advocated by Petitioner is not applied by this Court in fashioning remedies for analogous constitutional violations. Involuntary confessions are uniformly excluded without balancing competing interests because the Fifth Amendment was violated, regardless of the trustworthiness of the statement. *Spano v. New York*, 360 U.S. 315, 320-21 (1959). Sixth Amendment violations such as deliberately eliciting uncounseled incriminating statements require exclusion of the statements. *United States v. Henry*, 447 U.S. 264, 273 (1980). The fact a statement which may be excluded is accurate or truthful does not require the application of a balancing test. Similarly, the balancing process is inappropriate in determining the propriety of the core application of the only meaningful enforcement of the Warrant Clause's probable cause standard. "The Warrant Clause of the Fourth Amendment is not dead language . . . . 'It is not an inconvenience to be somehow "weighed" against the claims of police efficiency.' " *United States v. United States District Court*, 407 U.S. 297, 315-16 (1972) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971)).

Adoption of a "reasonable, good faith" test to limit application of the exclusionary rule will not save the rule; rather, it presages rejection of the rule in its entirety. Here, the Court is asked to make a value judgment: where the deterrent effect of the exclusionary rule is open to criticism, despite the admitted absence of any alternative deterrent, should the Court simply eliminate application of the rule in favor of the expediency of admitted constitutional violations? Once the first step is taken, by adoption of a good faith exception, drawing the line becomes an arbitrary choice based on a moral judgment between constitutional protections and police efficiency. Opponents of the rule may draw the line at due process vio-

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[11] *See, e.g., Brinegar v. United States*, 338 U.S. 160, 176 (1949) (probable cause standard provides balance between desire to prevent unreasonable invasions of privacy and attempt to give flexibility to law enforcement).

lations,[112] which ultimately threatens application of the exclusionary rule to the states under *Mapp*. But as a matter of *federal* law the line must be drawn at the Fourth Amendment, which does not contemplate a "reasonable" violation.

C. The Exclusionary Rule Does Act as an Important Disincentive to Fourth Amendment Violations.

Petitioner reasons that the exclusion of evidence where an officer relies on a search warrant in good faith cannot deter misconduct because it imposes a sanction on the wrong party. P. Br. at 61 & n.23. This argument misconceives the deterrent function of the exclusionary rule. The rule is not designed to "punish" an individual officer, nor is its goal the imposition of sanctions. Instead, the rule is a disincentive to constitutional violations which acts upon the criminal justice system as a whole. This misconception derives from the unfortunate use of the term "deterrence." As Professor Kamisar points out:

> "Deterrence" suggests that the exclusionary rule is supposed to influence the police the way the criminal law is supposed to affect the general public. But the rule does not, and cannot be expected to, "deter" the police the way a criminal law is supposed to work. The rule does not inflict a "punishment" on police who violate the fourth amendment; exclusion of the evidence does not leave the police in a worse position than if they had never violated the Constitution in the first place.
>
> Because the police are members of a structural government entity, however, the rule influences them, or is supposed to influence them, by "systemic deterrence", *i.e.*, through a department's institutional compliance with Fourth Amendment standards.

Kamisar, *supra*, 16 CREIGHTON L. REV. at 597 n.204. The underlying effect of the rule is not to repair damage done by a constitutional violation, but "to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it." *Stone v. Powell*, 428 U.S. 465, 492 (1976); *accord Elkins v. United States*, 364 U.S. 206, 217 (1960). Retired Justice Stewart, the author of the *Elkins* opinion,

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[112] *See, e.g. Illinois v. Gates*, 103 S. Ct. at 2343 n.14 (White, J., concurring) (shocking invasions of privacy should invoke the exclusionary rule as a matter of due process, along with intentional and flagrant violations of the Fourth Amendment, but a "reasonable" violation should be "viewed through a different lens").

recently explained that

> the exclusionary rule is not designed to serve a "specific deterrence" function; that is, it is not designed to punish the particular police officer for violating a person's fourth amendment rights. Instead, the rule is designed to produce a "systematic deterrence": the exclusionary rule is intended to create an incentive for law enforcement officials to establish procedures by which police officers are trained to comply with the fourth amendment because the purpose of the criminal justice system—bringing criminals to justice—can be achieved only when evidence of guilt may be used against defendants.

Stewart, *supra*, 83 COLUM. L. REV. at 1400 (footnote omitted).

This disincentive is accomplished in a number of ways. Aside from deterrence of the individual officer,[113] the rule also encourages compliance with Fourth Amendment requirements by law enforcement officers generally. Yet the effect of the rule extends beyond this, in that it affects those who make police policy decisions resulting in institutional compliance with the Fourth Amendment. This process is now commonly referred to as "systemic" deterrence.[114]

The logical effectiveness of the rule as an incentive for compliance with Fourth Amendment mandates has long been recognized by the Court:

> Despite the absence of supportive empirical evidence, we have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it. More importantly, over the long term, this demonstration that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system.

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[113]Of course, the rule does have an effect on the individual involved in an illegal search. One empirical study found a significant number of officers felt a personal loss when a court suppressed evidence they had seized. J. HIRSCHEL, FOURTH AMENDMENT RIGHTS 86-87 (1979). Surely the officers in this case will conduct more rigorous pre-warrant investigations in the future to assure a reasonable finding of probable cause, as shown by the hindsight desire for more corroboration expressed by the searching officer in *Gates* prior to this Court's decision. (*See supra* note 34).

[114]Mertens & Wasserstrom, *supra*, 70 GEO. L.J. at 394, 399-401.

> We adhere to the view that these considerations support the implementation of the exclusionary rule at trial. . . .

Stone v. Powell, 428 U.S. 465, 492-93 (1976) (footnotes omitted).

The compelling logic of the exclusionary rule as a disincentive is illustrated by hypothesizing its absence where police rely on a search warrant. The determination of the magistrate would be insulated from later review, so police would be free to find the most lenient magistrates available, without fear of jeopardizing their cases by avoiding the more rigorous requirements imposed in a properly conscientious probable cause examination.[115] It would become unnecessary to confer with a prosecutor,[116] because the benchmark of a valid warrant procedure would simply be the officer's belief in its reasonableness. The requirement of thorough pre-search investigation to corroborate an unknown informant's tip would be sacrificed to a desire to discover at the earliest possible time what the search will disclose.

The extent of the deterrent effect of the exclusionary rule is not subject to empirical proof. The obvious problem is proving a negative,[117] i.e., the extent to which police are not acting illegally as a result of the rule. It is impossible to observe and quantify cases where police are effectively deterred, and do not conduct an unconstitutional search. As the Court has

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[115]A study of the warrant process in seven cities found that in many instances, police now do not seek out overly lenient magistrates because they fear the warrant would be vulnerable to a motion to suppress. As explained by one judge: "I believe that the average cop around here doesn't want his warrant to fall and they will, therefore, go to a judge who they believe knows the law and will give them a ruling that will stand up." VAN DUIZEND, THE SEARCH WARRANT PROCESS, *supra*, at 7-7. This disincentive against magistrate shopping is removed by a good faith exception.

[116]The affiant in this case had no assistance in preparing the warrant application, but did show it to three deputy district attorneys prior to taking it to the magistrate. [J.A. 103] While this evidences substantial doubt in the affiant's mind as to whether he had shown probable cause, internal review is a salutary practice. The incentive for this review is removed by application of a reasonable good faith exception. The proposed exception would actually discourage such review. The officer may fear that the "reasonableness" of his reliance on the warrant would be undermined at a suppression hearing if he had conferred with a prosecutor who expressed doubts about the sufficiency of the warrant application.

[117]*See Elkins v. United States*, 364 U.S. 206, 218 (1960).

noted[118] and Petitioner concedes [P. Br. at 40-41], each study of the rule's deterrent effect is flawed and inconclusive.[119]

The Court has previously accepted a deterrence rationale despite the lack of empirical proof of its effectiveness.[120] In the context of capital

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[118]*United States v. Janis*, 428 U.S. 433, 449-50 (1976).

[119]The principal study relied upon by critics of the exclusionary rule, conducted by Dallin Oaks, was based entirely on one city, Cincinnati, and simply studied arrests for possessory crimes before and after *Mapp*. His data on arrests from 1956 to 1967 is now hopelessly dated, and he admits his study was inconclusive. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 709 (1970).

A similar study by James Spiotto was similarly limited to one city, Chicago. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243 (1973). His data, based on the years 1960-1970, is similarly out of date. He examined the outcome of suppression motions before and after *Mapp*, on the theory that declining rates of suppression would show increased police sensitivity to Fourth Amendment rights. Spiotto found that suppression rates did not decline, but failed to take into account that Illinois had adopted its own exclusionary rule in 1923. Critique, *On The Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and* United States v. Calandra, 69 NW. U.L. REV. 740, 754 (1974).

A more recent study which examined data from 19 large cities and estimates from 65, showed that fewer than 10% of suppression motions were granted and that the frequency of search warrants had increased. Canon, *Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for its Retention*, 23 S. TEX. L.J. 559, 562, 569 (1982). Canon concluded that the exclusionary rule "can and does have a very real, although hardly universal, deterrent effect on the police." Canon, *The Exclusionary Rule: Have Critics Proven That it Doesn't Deter Police?*, 62 JUDICATURE 398, 400 (1979).

[120]Petitioner argues that the burden to prove the rule's deterrent effect is on those who seek its retention. [P. Br. at 39] While this may be true in derivative applications of the rule in collateral proceedings, *see Stone v. Powell*, 428 U.S. 465, 499-500 (1976) (Burger, C.J., concurring), the Court has consistently upheld the deterrent effect of the exclusionary rule in its core application at trial ever since *Weeks*. *See, e.g., Stone v. Powell*, 428 U.S. at 492-93. Petitioner now asks the Court to ignore its consistent approval of the rule's central application at trial over the past 70 years. In this context, it is clearly the Petitioner who must shoulder the heavy burden of proving that the proposed exception would not encourage the use of warrants without probable cause.

punishment, the Court found the data on its deterrent effect to be "inconclusive," but that it could nevertheless safely assume that for at least some potential murderers, the death penalty "undoubtedly is a significant deterrent." *Gregg v. Georgia*, 428 U.S. 153, 185-86 (1976).

Proof of the effectiveness of the exclusionary rule as a systemic incentive for stricter compliance with the Fourth Amendment does not rest on logical assumption alone. It is demonstrated by law enforcement response to judicial announcement of Fourth Amendment standards.[121]

For instance, as recently pointed out by retired Justice Stewart,[122] Deputy Commissioner Leonard Reisman, the head of the New York City Police Department's legal bureau, explained at a post-*Mapp* training session:

> "The *Mapp* case was a shock to us. We had to reorganize our thinking, frankly. Before this, nobody bothered to take out search warrants. Although the U.S. Constitution requires warrants in most cases, the U.S. Supreme Court had ruled that evidence obtained without a warrant—illegally, if you will—was admissible in state courts. So the feeling was, why bother?
>
> "Well, once that rule was changed we knew we had better start teaching our men about it."

N.Y. Times, April 28, 1965, at 50, col. 1.

Commissioner Michael Murphy of New York echoed the same response:

> I can think of no decisions in recent times in the field of law enforcement which had such a dramatic and traumatic effect as this [application of the exclusionary rule] . . . I was immediately caught up in the entire program of reevaluating our procedures, which had followed the *DeFore* rule, and modifying, amending, and creating new policies and new instructions for the implementation of *Mapp* . . . . Retraining sessions had to be held from the very top admin-

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[121] As succinctly put by Professor LaFave:

> [T]hat the exclusionary rule does have a deterrent effect is certainly reflected by such post-exclusionary rule phenomena as the dramatic increase in the use of search warrants where virtually none had been used before, stepped up efforts to educate the police on the law of search and seizure where such training had before been virtually nonexistent, and the creation and development of working relationships between police and prosecutors to ensure the obtaining of evidence by means which would not result in its suppression.

LaFave, *supra*, 43 U. PITT. L. REV. at 319 (footnotes omitted).

[122] Stewart, *supra*, 83 COLUM. L. REV. at 1386.

istrators down to each of the thousands of foot patrolmen.[123]

Similarly, when California adopted the exclusionary rule Los Angeles Police Chief William Parker stated that "[a]s long as the exclusionary rule is the law of California, your police will respect it and operate to the best of their ability within the *framework of limitations imposed by that rule*.' W. PARKER, POLICE 117, 131 (1957) (emphasis added). Stephen Sachs, the Attorney General of Maryland, testified that "[i]n my state, *Mapp* has been responsible for a virtual explosion in the amount and quality of police training in the last twenty years." *Exclusionary Rule Hearings, supra*, at 41.

Response to the "framework of limitations" imposed by the exclusionary rule — i.e., the requirements of the Fourth Amendment—is evoked by each Fourth Amendment decision. FBI Director William Webster stated that "within 24 hours after a major case comes down affecting our right to do anything, the people in the field are informed of the significance of that case, with more details to follow." Webster, *Routine Methods Won't Stop the Leaders of Crime*, AMHERST, Summer 1981, at 21. As an example, he explained how agents within the Sixth Circuit were promptly order to stop surreptitious entries to install microphones under 18 U.S.C. § 2518 court orders, after such break-ins were ruled illegal in *United States v. Finazzo*, 583 F.2d 837, 841-42 (6th Cir. 1978), *vacated*, 441 U.S. 929 (1979). After that decision was vacated in light of *Dalia v. United States*, 441 U.S. 238 (1979), agents were sent instructions requiring them to continue to obtain court orders for surreptitious entries, despite the Court's ruling that such orders were not statutorily required. Webster, *supra*, at 21.

Another dramatic example of the systemic effect of the rule is the response of various police agencies to *Delaware v. Prouse*, 440 U.S. 648 (1979), which struck down random automobile stops for license checks without any articulable suspicion of criminal activity. *Id.* at 663. The District of Columbia Metropolitan Police had conducted such stops in good faith under the authority of a 1972 District of Columbia appellate decision. After *Prouse*, the Chief of Police immediately ordered officers to cease the practice, and the change in procedures is now reflected in the written departmental regulations imposed on every officer.[124]

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[123]Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 TEX. L. REV. 939, 941 (1966).

[124]Mertens & Wasserstrom, *supra*, 70 GEO. L.J. at 400.

In New Jersey, the county prosecutor immediately urged municipal police departments to adjust policies to the *Prouse* prescriptions, and forwarded regulations approved by the Attorney General of New Jersey. As a result, township police adopted written, constitutional procedures for traffic stops. *State v. Coccomo*, 177 N.J. Super. 575, 579 & n.1, 427 A.2d 131, 133 & n.1 (1980).[125]

Similarly, the Delaware State Police responded to a lower court decision prior to *Prouse* but with the same holding. Within two months of that decision, the State Attorney General's Office had conferred with the state police legal officer, and a memorandum was disseminated to every unit in the state police system, describing the conduct prohibited by *Prouse*, and providing examples of the articulable suspicion required to justify a stop. Similar memoranda are provided to all officers regarding any court decision which affects police operations.[126]

This example illustrates the fallacy of the argument that the "sanction" of suppression is disproportionate to the officer's misconduct. The officers in *Prouse* were acting in reasonable good faith, in that the Court's prohibition of random stops had not been predictably articulated. In this sense, the suppression of evidence may seem superficially disproportionate. Yet that view misconceives the rule's function to be akin to punishing the officer. Viewed in light of the rule's actual purpose and operation, regular police procedures in one of the most commonplace and potentially intrusive citizen encounters—traffic stops—were brought within constitutional bounds across the country, as the cost of one marijuana conviction.[127]

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[125]Cases abound where traffic stops and subsequent seizures were upheld, not because of the reasonable good faith of the officers, but because police acted constitutionally, within the guidelines mandated in *Prouse*. *See, e.g., United States v. Prichard*, 645 F.2d 854, 856-57 (10th Cir. 1981); *People v. Carlton*, 81 Ill. App. 3d 738, 741-42, 402 N.E.2d 310, 314 (1980); *State v. Shankle*, 58 Or. App. 134, 138-39, 647 P.2d 959, 961-62 (1982); *People v. John BB.*, 56 N.Y.2d 482, 487-88, 438 N.E.2d 864, 867, 453 N.Y.S.2d 158, 161 (1982).

[126]Mertens & Wasserstrom, *supra*, 70 GEO. L.J. at 400.

[127]Another example which was witnessed by this Court is police response to *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), which required probable cause for random stops and full automobile searches near the Mexican border. *Id.* at 269. As a result of that decision, Border Patrol agents revised their procedures, stopping cars only on articulable suspicion, and then conducting only limited questioning. This practice was subsequently upheld, not on the basis of good faith, but because it was within the Fourth Amendment. *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 n.6, 881-82 (1975).

This phenomenon is not limited to isolated cases. Similar responses to Fourth Amendment developments enforced by the exclusionary rule are common across the country. The Van Duizend study found numerous instances where officers were advised of recent court decisions or training programs were initiated in response to developments in search and seizure law. VAN DUIZEND, THE SEARCH WARRANT PROCESS, *supra*, at 5-2. Another empirical study involving interviews with chiefs of police in small towns in Illinois and Massachusetts found virtually all departments had policies in compliance with Fourth Amendment requirements as interpreted by this Court. S. WASBY, SMALL TOWN POLICE AND THE SUPREME COURT 86-91 (1976). A study involving police in sixty-five cities found that most police departments "changed policies in accord with major shifts in Supreme Court policies." Canon, *Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for its Retention*, 23 S. TEX. L.J. 559, 567 (1982) (footnote omitted).

The Petitioner argues that application of the exclusionary rule in this case may chill legitimate police activities [P. Br. at 73], presumably by deterring police from obtaining warrants. As police are already aware, the law rewards the officer who uses a warrant, by the deference afforded the magistrate's decision, and the preference accorded warrants in marginal cases. *United States v. Ventresca*, 380 U.S. at 109. The Van Duizend study found that a significant incentive for the use of a warrant is that it will normally provide an opportunity to search a much broader area. Objects of the warranted search, such as "evidence of dominion and control," justify virtually unrestricted searches of a given place. VAN DUIZEND, THE SEARCH WARRANT PROCESS, *supra*, at 2-21, 5-8. Moreover, the risk of suppression resulting from a warrantless search is obviously substantially higher. Application of the exclusionary rule to warrants bears no relation to the incentive for a warrant where a warrantless search may be permissible.

While it may be argued that a good faith exception would increase incentives to utilize warrants, it would not increase incentives to comply with the probable cause requirement. The increased use of warrants, if any, would be for the wrong reasons—to capitalize on the opportunity to search while remaining insulated from later judicial scrutiny of probable cause.

D. Maintenance of the Disincentive Provided by Application of the Exclusionary Rule to This Case Is Constitutionally Compelled Because Its Removal Will Encourage Future Violations.

The imperative of judicial integrity, a major basis for the original adoption of the exclusionary rule; *see Weeks*, 232 U.S. at 392, has never been repudiated by the Court. Instead, judicial integrity is now perceived

to be vindicated by the exclusionary rule's discouragement of constitutional violations. *See United States v. Peltier*, 422 U.S. 531, 538 (1975); *Illinois v. Gates*, 103 S. Ct. at 2343 (White, J., concurring). As explained in *United States v. Janis*:

> The primary meaning of judicial integrity in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution. . . . The focus therefore must be on the question whether the admission of the evidence encourages violations of Fourth Amendment rights. As the Court has noted in recent cases, the inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose.

428 U.S. at 458 n.35 (citation omitted). This formulation imposes a constitutional mandate on the Court to avoid any incentive or encouragement of constitutional violations.

This approach is consistent with the Court's rejection of the argument that derivative use of illegally seized evidence constitutes a separate violation of a defendant's personal rights. In rejecting this argument in *United States v. Calandra*, 414 U.S. 338, 354 (1974), the Court observed that the Fourth Amendment violation was "fully accomplished by the original search without probable cause." The imperative of judicial integrity arguably may not focus on whether ramifications of the violation are exacerbated by derivative use of its fruits; it does, however, compel the Court to avoid encouragement of future violations. To this extent, the imperative of judicial integrity does overlap the deterrent function of the rule.

Given the accurate understanding of "deterrence" as the systemic effect of a disincentive, it follows that the Court must avoid a policy which would encourage government institutions, including but not limited to the police, to avoid or disregard the requirements of the Fourth Amendment. This mandates application of the exclusionary rule to the government's case-in-chief, because even if enforcing the rule would not deter police from violating the Fourth Amendment, "repealing the rule would positively *encourage* such unconstitutional activity."[128]

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[128]P. Johnson, New Approaches to Enforcing the Fourth Amendment 4 (Working Paper, Sept. 1978) (*quoted in* Kamisar, *supra*, 16 CREIGHTON L. REV. 565, 662 (emphasis in original)). To demonstrate this point, retired Justice Stewart observed:

> After the Court's opinion in *Alderman v. United States*, 394 U.S. 165 (1969), holding that fourth amendment protections are personal and could not be claimed by a person whose own constitutional rights

In this case, application of a reasonable good faith exception would positively encourage avoidance of the probable cause requirement by both police and magistrates. *See supra* discussion at 20-25).

E. The Disincentive Rationale of the Exclusionary Rule Is Not Limited to Police, and Must Include Magistrates.

The intended impact of the exclusionary rule has never been explicitly limited to police officers. The Court stated as early as *Weeks v. United States*, 232 U.S. 383, 394 (1914) that "the 4th Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law, *acting under legislative or judicial sanction*." [Emphasis added].

Where a magistrate issues a warrant on less than probable cause, he has violated the Constitution just as surely as an officer who conducts an unreasonable warrantless search. The Fourth Amendment does not specify a particular branch of government to which it is directed. As retired Justice Stewart has stressed:

> [I]f the fourth amendment's probable cause requirement is to be enforced, reviewing courts must have the authority on occasion to inform magistrates *in a meaningful way* that warrants based on something less than probable cause *are not to be tolerated*. . . . [In the absence of the exclusionary rule's application to warrants issued without probable cause,] there is no incentive—apart from a professional desire to comply with the fourth amendment—for that magistrate to refrain from repeating the same mistake in the future or from granting any colorable request for a search warrant.

Stewart, *supra*, 83 COLUM. L. REV. at 1403 (emphasis added).

Petitioner argues that there is no basis to assume that suppression of the fruits of a search because of an invalid warrant can have any impact on the issuing magistrate, who is an inappropriate target for the "punishment" of the exclusionary rule. [P. Br. at 58-59] This again misconceives the deterrent function as a punitive sanction. Application of the exclusionary rule allows the courts to review magistrate errors, thereby

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had not been violated, " 'the government affirmatively counsel[ed] its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties.' "

Stewart, *supra*, 83 COLUM. L. REV. at 1403 n.201 (citations omitted).

setting meaningful standards for probable cause determinations.[129] Moreover, it allows the focus of review to remain on the potential violation — absence of probable cause — instead of on the reasonableness of a police officer's belief that the warrant was valid.

V.

THE SEARCH OF RESPONDENT LEON'S HOME DOES NOT FALL WITHIN THE PROPOSED REASONABLE GOOD FAITH EXCEPTION.

Even if the exclusionary rule were not to apply where an officer reasonably relies on a search warrant in good faith, that exception would not properly apply to the search of Alberto Leon's house. Although this issue was not actively litigated in the trial court, the facts presented to the magistrate regarding Mr. Leon were such that no reasonable California police officer could conclude, under the prevailing articulated legal standards,[130] that probable cause to search Mr. Leon's house had been made out. The search was unlawful under *Aguilar-Spinelli* and would be unlawful under the standard articulated in *Gates*.

Petitioner concedes that the mere issuance of a warrant would not totally foreclose further inquiry into probable cause under the proposed reasonable good faith exception, and that the exception would not apply to warrants if it is entirely unreasonable to believe probable cause exists, or to conclusory warrants akin to *Aguilar*. [P. Br. at 65] The warrant in this case falls in this category, at least as it purports to authorize a search of the house on Sunset Canyon which was purportedly owned by respondent Leon.

The initial tip from a confidential informant of unknown reliability made no mention of Alberto Leon. Throughout the surveillance, officers never saw Mr. Leon, and the affidavit does not even intimate that he was ever present at the Price Drive house or the implied stash pad at Via Magdelena. Five days after surveillance of the Price Drive house began, an automobile registered to Respondent Del Castillo was seen at the house

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[129] As explained, *supra*, pp. 15-16, the threat of reversal also makes magistrates more conscientious in examining warrant applications.

[130] The prevailing articulated standard at the time of the application to search Respondent Leon's house included what was commonly understood as the two-prong *Aguilar-Spinelli* test, which this affidavit blatantly failed to meet. Moreover, the affidavit also failed to meet the totality of the circumstances test set out in *Gates*.

for a brief visit. Research disclosed that while Del Castillo was on probation at some point between five months and two and a half years earlier, he gave a telephone number listed under Leon's name in Glendale as the name of his employer.[131] During further surveillance four days later, Respondent Sanchez left the Price Drive house and visited the house owned by Leon on South Sunset Canyon in Burbank — a different address than Glendale. Sanchez stayed for twenty minutes and left with a small package. Leon was not seen at this or any other time, and we do not know what the package contained, which could be anything from a borrowed book to homemade cookies. Three weeks later,[132] an unidentified visitor left the Price Drive house some time after 10:15 and drove to Leon's house on Sunset Canyon;[133] at the time a car registered to Leon was parked at the house. Shortly after midnight the unidentified male left and returned to Price Drive. [J.A. 49]

This is the extent of facts regarding Leon obtained through police surveillance. The only other information regarding Respondent concerned two other entirely uncorroborated and stale informant tips.[134] One was a statement by a co-defendant after Leon was arrested in April of 1980.[135] While in jail, the co-defendant claimed Leon was connected to the "Cuban Mafia" and drug importation. The co-defendant was obviously not a mere citizen informant, and no allegation of her credibility, reliability, or the source of the information, nor corroboration of her statement is mentioned in the affidavit.

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[131]It is doubtful that Del Castillo was facetiously listing the number of a criminal partner, because he gave the number to the probation department.

[132]No activity relating to Leon was reported in the interim.

[133]The affidavit does not establish that Leon lived, or was even present, at the Sunset Canyon house. We only know that he owned the house and that an automobile parked out front was registered in the names of Leon and a Dinorah Jimenez, about whom we are told nothing. [J.A. 49] Given information connecting Leon to an address in another town, Glendale, as recently as a month earlier, it is very possible that Ms. Jimenez was a friend of Leon's and was the sole occupant of the Sunset Canyon house.

[134]One other piece of information of negligible consequence was that over 18 months earlier, Leon was arrested for possession of a "small quantity" of quaalude tablets in another city, but there was no indication he was ever convicted of this offense. [J.A. 40]

[135]The District Attorney declined prosecution of Leon at that time, and someone else was charged and convicted of possession of the drugs seized at the time of the arrest. [J.A. 39]

The other "tip" came via the Glendale police, who said that on an unspecified date during or before July 1981, an unidentified and presumably unproven informant told them that at some other unspecified date Leon had quaalude tablets in his Glendale residence.[136] There was no information listed as to the informant's veracity, the reliability of his or her information, or the basis of his or her knowledge. Similarly, there was no corroboration of the tip; the only additional fact is that the unknown informant would not attempt to buy drugs from Leon. [J.A. 40]

In summary, the warrant application showed two stale,[137] wholly uncorroborated and conclusory tips, akin to *Aguilar*, and the most peripheral connection between people surveilled at Price Drive and a house owned by Leon which had never been mentioned in a prior tip. These facts do not come even close to probable cause to search the Sunset Canyon house[138] and under the predictably articulated requirements of probable cause, it was not reasonable for a well-trained officer to believe that probable cause to search that house existed. At the most, the information merely gave rise to a suspicion that Respondent Leon was associated with individuals who may have been involved in criminal activity. There were no facts establishing probable cause to believe that evidence would be found at the Sunset Canyon residence.

Even under the flexible reasonableness standard set out in *Gates*, no well-trained officer could reasonably believe that the above facts constitute a "substantial basis for concluding" that the evidence to be seized could be found in the Sunset Canyon house. Otherwise, it would be "reason-

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[136]Significantly, neither of these unverified tips made any mention of the house on Sunset Canyon in Burbank which was ultimately searched.

[137]The tips, provided in April of 1980 and on an unspecified date prior to July 1981, are impermissibly stale. *See Sgro v. United States*, 287 U.S. 206, 210 (1932).

[138]The facts in support of the warrant to search Leon's house do not come remotely as close to probable cause as those in *Spinelli v. United States*, 393 U.S. 410, 413-14 (1969). In *Spinelli*, officers personally observed Spinelli going in and out of the target apartment, and were given two telephone numbers from an allegedly reliable informant. The numbers were corroborated as belonging to phones in the apartment, which the informant said was used for illegal gambling. In the instant case, no informant was known or claimed to be credible, there was no information about how either informant got his information, neither informant referred to the Sunset Canyon house, and the officers never actually saw Leon.

able" for an officer to believe that a tip from an informant who is not even alleged to be credible nor to have reliable information,[139] is sufficiently corroborated if the subject of the tip has been charged with a similar crime in the past, regardless of whether he was convicted and regardless of the lack of nexus between the tip and the place to be searched. This conclusion not only does not comport with the law; it does not come close to an objectively reasonable understanding of "predictably articulated" legal principles as perceived by a reasonable police officer.

This conclusion is even more compelling in light of the "predictably articulated" law regarding warrants prior to *Gates*. California courts had uniformly interpreted the rule of *Aguilar-Spinelli* to be the "two-pronged" test, requiring evidence that an informant was credible, and that his information was reliable. *Illinois v. Gates*, 103 S. Ct. at 2327.[140] Any well-trained California officer would reasonably have known that as to the search of the Sunset Canyon house, the facts in the affidavit satisfied neither prong of the *Aguilar-Spinelli* test for either of the informants relating to Leon, and that there was not any adequate corroboration of the tips.[141]

VI.

SINCE THE SEARCH OF ALBERTO LEON'S HOUSE DOES NOT FALL WITHIN THE PROPOSED REASONABLE GOOD FAITH EXCEPTION, *ILLINOIS V. GATES* SHOULD NOT BE APPLIED RETROACTIVELY TO THAT SEARCH.

The question for which *certiorari* was granted presumes that the search warrant issued in this case was defective for lack of probable cause. Petitioner specifically declined to seek review of the ruling that probable

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[139]*Contrast Aguilar v. Texas*, 378 U.S. at 120 (affiant stated he had "reliable" information from a "credible" informant).

[140]*See, e.g., People v. Smith*, 17 Cal. 3d 845, 850, 132 Cal. Rptr. 397, 400, 553 P.2d 557, 560 (1976); *People v. Hamilton*, 71 Cal. 2d 176, 179, 77 Cal. Rptr. 785, 787, 454 P.2d 681, 683 (1969) (citing the *Spinelli* reference to "*Aguilar*'s two-pronged test"); *People v. Scoma*, 71 Cal. 2d 332, 337, 78 Cal. Rptr. 491, 494-95, 455 P.2d 419, 423-24 (1969); *People v. Cooks*, 141 Cal. App. 3d 224, 293, 190 Cal. Rptr. 211, 261 (1983).

[141]California courts have consistently held that frequent visits by suspected narcotics offenders, prior criminal records and conduct consistent with innocence are insufficient corroboration of informants' tips. *See, e.g., Alexander v. Superior Court*, 9 Cal. 3d 387, 394, 107 Cal. Rptr. 483, 488, 508 P.2d 1131, 1136 (1973); *Halpin v. Superior Court*, 6 Cal. 3d 885, 895, 101 Cal. Rptr. 375, 381-82, 495 P.2d 1295, 1301-02 (1972).

cause was lacking in this case. [Pet. at 9 n.10] In light of this and the fact that probable cause to search was lacking under the standards set out in *Gates*, this Court need not reach the issues of whether any new standards were announced in *Gates*, and whether such standards should be retroactively applied to facts occurring prior to that decision.

Moreover, if the Court decides to apply a reasonable good faith exception to search warrants lacking in probable cause, that exception should only be applied prospectively and not to the instant case. *See U.S. v. Peltier*, 422 U.S. 531 (1975).

Conclusion.

For each of the above reasons, the order of the District Court should be affirmed.

November, 1983.

Respectfully submitted,

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APPENDIX.

State Statutes Providing for Search Warrants Issued by Non-Attorneys.

ALABAMA*	ALA. CODE § 12-17-251(c)(1) (Supp. 1982).
ALASKA	ALASKA STAT. §§ 22.15.100(4), 22.15.160 (1982); ALASKA CRIM. R. 37(a)(1) (1978).
ARIZONA	ARIZ. CONST. art. 7, § 15 (Supp. 1983); ARIZ. REV. STAT. ANN. § 11-402 (1977); ARIZ. REV. STAT. ANN. § 13-3911 (Supp. 1983).
ARKANSAS	ARK. CONST. art. 7, § 41 (1947); ARK. STAT. ANN. § 43-205(A), -1405(5) (1977); ARK. R. CRIM. PROC. 1.6(c) (1977).
COLORADO	COLO. REV. STAT. §§ 13-6-106(1)(b), -203(3), (5) (1973 & Supp. 1982); COLO. REV. STAT. § 13-10-106 (1973 & Supp. 1982); COLO. REV. STAT. § 16-3-301(1) (1978).
DELAWARE	DEL. CONST. art. IV, §§ 2, 29-30 (1974 & Supp. 1982); DEL. CODE ANN. tit. 11, § 2304 (1979).
FLORIDA	FLA. STAT. § 34.021 (Supp. 1983); FLA. STAT. § 933.01 (Supp. 1983).
GEORGIA	GA. CODE § 24-402 (Supp. 1982); GA. CODE § 27-303(a) (1981).
IDAHO	IDAHO CODE §§ 1-2206, 1-2208(3)(c) (Supp. 1983).
ILLINOIS*	ILL. CONST. art. 6, § 11 (Smith-Hurd 1971) (Transition Schedule § 4(b) (1970)); ILL. ANN. STAT. ch. 38, § 108-3 (Smith-Hurd 1980).
INDIANA	IND. CODE ANN. §§ 33-10.1-3-2, 35-33-5-1 (Burns Supp. 1983).
IOWA	IOWA CODE ANN. §§ 602.52, 602.60 (West Supp. 1983); IOWA CODE ANN. § 808.4 (West 1979).
KANSAS	KAN. STAT. ANN. §§ 20-337, 22-2502 (1981).
KENTUCKY	KY. CONST. § 100 (1970); KY. REV. STAT. § 15.725(4) (Supp. 1982); KY. R. CRIM. P. 13.10(1) (1983).
MASSACHUSETTS	MASS. ANN. LAWS ch. 218, § 33 (Michie/Law. Co-op. (Supp. 1983)).

MICHIGAN	MICH. COMP. LAWS ANN. §§ 600.8507, 600.8511(d) (1982).
MINNESOTA	MINN. STAT. ANN. § 626.06 (1983).
MISSISSIPPI	MISS. CONST. art. 6, § 171 (Supp. 1982); MISS. CODE ANN. § 99-15-11 (1972).
MISSOURI	MO. ANN. STAT. §§ 479.010, 479.020.3, 479.100, 542.266.2 (Vernon Supp. 1983).
MONTANA	MONT. CODE ANN. §§ 3-10-202, 46-1-201, 46-5-202 (1983).
NEBRASKA	NEB. REV. STAT. § 24-519(4) (1979).
NEVADA	NEV. REV. STAT. §§ 4.010, 169.095, 179.025 (1981).
NEW HAMPSHIRE	N.H. REV. STAT. ANN. § 502-A:3 (1968); N.H. REV. STAT. ANN. § 595-A:1 (1974).
NEW JERSEY*	N.J. STAT. ANN. § 2A:8-7, :8-15 (West 1952); N.J. CRIM. PROC. R. 3:5-3 (1982).
NEW MEXICO	N.M. STAT. ANN. § 35-14-2.A, -3 (1978).
NEW YORK	N.Y. CONST. art. 6, § 20(c) (McKinney 1969 & Supp. 1982); N.Y. CRIM. PROC. LAW § 10.10 (McKinney 1981); N.Y. CRIM. PROC. LAW § 690.05(1) (McKinney 1971).
NORTH CAROLINA	N.C. GEN. STAT. § 7A-171.2(b), -180(5), -273(4) (1981).
NORTH DAKOTA	N.D. CENT. CODE § 27-07.1-07 (Supp. 1983); N.D. CENT. CODE § 29-29-01 (1974); N.D. CENT. CODE § 40-18-01 (Supp. 1983).
OHIO*	OHIO REV. CODE ANN. § 1907.051 (Baldwin 1982); OHIO REV. CODE ANN. § 2933.21 (Baldwin 1979).
OKLAHOMA	OKLA. CONST. art. 7, § 8(h) (West 1981); OKLA. STAT. ANN. tit. 22, § 162 (West Supp. 1982); OKLA. STAT. ANN. tit. 22, § 1221 (West 1958).
OREGON	OR. REV. STAT. § 51.240 (1979); OR. REV. STAT. §§ 133.525(1), 133.545(1) (1981).
PENNSYLVANIA	PA. STAT. ANN. tit. 42, § 3101(a) (1981); PA. R. CRIM. PROC. 3(j), 2001 (1981).
SOUTH CAROLINA	S.C. CODE ANN. §§ 17-13-140, 22-1-10 (Law. Co-op 1976).
SOUTH DAKOTA	S.D. CODIFIED LAWS ANN. § 16-12A-13 (1979); S.D. CODIFIED LAWS ANN. §§ 23A-35-2, -45-9(3) (1974 & Supp. 1983).

TENNESSEE	TENN. CONST. art. 6, § 4 (1980); TENN. CODE ANN. § 16-15-201 (Supp. 1983); TENN. CODE ANN. §§ 40-5-102, -6-101 (1982).
TEXAS	TEX. CONST. art. 5, § 15 (Vernon 1955); TEX. CODE CRIM. PROC. ANN. art. 2.09, 18.01(a) (Vernon Supp. 1982).
UTAH	UTAH CODE ANN. §§ 77-1-3(4), 77-23-1, 78-5-1 (1982 & Supp. 1983).
VIRGINIA	VA. CODE §§ 19.2-37, -45(2) (1983).
WASHINGTON	WASH. REV. CODE ANN. § 2.20.020 (Supp. 1983); WASH. REV. CODE ANN. § 3.04.040 (1961); WASH. REV. CODE ANN. §§ 10.79.010, 10.79.015 (1980).
WEST VIRGINIA	W. VA. CODE § 50-1-4 (1980); W. VA. CODE § 62-1A-3 (1977).
WYOMING	WYO. STAT. §§ 7-3-501, -7-101 (1977); WYO. ST. J.P. ADMIN. R. 2 (1983).

* Denotes states with grandfather clause provisions permitting existing non-attorney magistrates to issue search warrants.

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